UNITED STATES COURT OF APPEALS
UNITED STATES COURTHOUSE
40 FOLEY SQUARE
NEW YORK, NY 10007

CHAMBERS OF
SONIA SOTOMAYOR
U.S. CIRCUIT JUDGE

(212) 857-2420
FAX (212) 857-2429

July 20, 2009

Honorable Patrick J. Leahy
Chairman, United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20515

Dear Chairman Leahy:

Enclosed please find my responses to the written questions of Senators Sessions, Grassley, Kyl, Cornyn, and Coburn in connection with my pending nomination.

Sincerely,

Sonia Sotomayor

Enclosures

cc:
Honorable Jeff Sessions
Ranking Member, United States Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, DC 20515

Responses of Judge Sonia Sotomayor
to the Written Questions of Senator Jeff Sessions

Second Amendment

1. Prior to your most recent confirmation hearing, you have spoken clearly about your support for the use of foreign law by United States judges. You have said that you agree with Justice Ginsburg's statement that foreign law helps us know "whether our understanding of our own constitutional rights [falls] into the mainstream of human thinking."

Many countries around the world however, including some of our closest allies, take a far different view from our own country's regarding gun ownership. Great Britain has almost a total ban on the ownership of firearms, Germany has some of the most restrictive firearms ownership laws in Europe, and in Australia, self defense is not considered a legitimate purpose for owning a gun.

On October 31, 2008, members of the United Nations General Assembly passed a resolution supporting the negotiation of a global treaty on the gun trade. The United States was one of only two countries that voted against the resolution.

You have cited approvingly in your speeches the Supreme Court's use of foreign law in determining how to interpret the Fifth and Fourteenth Amendments (*Lawrence*) as well as the Eighth Amendment (*Roper v. Simmons*) to our Constitution.

On Thursday, however, in a discussion with Senator Coburn, you stated, "I will not use foreign law to interpret the Constitution or American statutes. I will use American law, constitutional law to interpret those laws except in the situations where American law directs the court."

- **a. What did you mean by the word "use"? Did you mean that you would not consider foreign law at all in interpreting the Constitution or statutes, or merely that you would not cite foreign law as the basis for your legal conclusions?**
- **b. Would foreign laws regarding gun ownership be relevant to you in your efforts as a judge to interpret the Second Amendment?**
- **c. If foreign laws are not relevant, how do you distinguish when it is appropriate to use foreign law to assist in the interpretation of the Constitution and when it is not? Isn't foreign law then simply a vehicle by which judges indulge their own policy preferences?**
- **d. If foreign laws are relevant, are the Fifth, Eighth, and Fourteenth Amendments the only places in your mind where foreign law is relevant in interpreting the Constitution?**

Response: In my view, American courts should not "use" foreign law, in the sense of relying on decisions of foreign courts as binding or controlling precedent, except when American law requires a court to do so. In some limited circumstances, decisions of foreign courts can be a

source of ideas, just as law review articles or treatises can be sources of ideas. Reading the decisions of foreign courts for ideas, however, does not constitute "using" those decisions to decide cases.

Because cases raising Second Amendment questions are currently pending before the Court, I would not comment on how I would decide those cases if I am confirmed.

Ricci v. DeStefano

1. In *Ricci v. DeStefano*, you initially joined a summary order dismissing the novel claims of white and Hispanic firefighters who had been discriminated against after they scored higher than other groups on a promotional exam. You failed to cite any precedent and issued a brief one-paragraph summary order, then a one-paragraph *per curiam* opinion. The Supreme Court reversed your opinion.

- **a. Please explain the process for circulating summary orders on the Second Circuit and how that circulation process differs from the circulation of other opinions such as *per curiam* opinions, authored opinions, concurrences, or dissents.**
- **b. At your hearing, you repeatedly said that in *Ricci* you relied on a 78-page district court opinion. The district court's opinion was actually 48 pages (and as published in the federal reporter, only 21 pages). Where did you come up with your number of 78 pages?**
- **c. Why did you choose to withdraw your summary order and instead make the district court's analysis binding precedent in the Second Circuit?**
- **d. Was there a vote taken to issue a summary order by the panel? How did you vote on that decision?**
- **e. Press reports indicate that there was disagreement amongst the panel members—what was the nature of that disagreement?**

Response: The practice of the Second Circuit has changed over the years. Currently, and when *Ricci v. DeStefano*, 264 Fed. Appx. 106 (2d Cir. 2008), was decided, the primary method by which decisions of the Court are circulated is through an email sent each morning by the library of the Second Circuit that lists the cases decided that day and provides a clickable link to the full text of each case's decision, whether it is a signed opinion, a *per curiam*, or a summary order. The decisions also are posted on the Court's website, which is accessible both to Court staff and to the public. Printed copies of the signed opinions and *per curiam*s are then sent to each Judge, and printed copies of the summary orders are sent to the members of the panels that issued them. In addition, a signed opinion, *per curiam*, or summary order is sent to the chambers of each active Judge upon the filing of a motion for rehearing en banc, along with the motion, pursuant to Interim Local Rule 35(a) of the Local Rules of the Second Circuit.

You are correct that the district court's decision was 48 pages long as issued by that court, not 78 pages as I had thought. It is possible that the decision was 78 pages as initially reproduced by Lexis and Westlaw, using those services' "star" pagination, but those original versions of the district court's decision are no longer available.

Rule 32.1(a) of the Local Rules of the Second Circuit provides that a case may be decided by summary order when the decision of the panel is unanimous and "each judge of the panel believes that no jurisprudential purpose would be served by an opinion." The decision of the panel in *Ricci* to issue a summary order was made in accordance with that Rule. The decision to issue a *per curiam* followed the vote of the Court not to rehear the case *en banc*. Panel members of the Second Circuit do not discuss the internal deliberations of the panels.

Abortion

1. In a recent interview with *New York Times Magazine*, Justice Ruth Bader Ginsburg was quoted as saying the following:

> **"Frankly I had thought that at the time *Roe* was decided, there was concern about population growth and particularly growth in populations that we don't want to have too many of. So that *Roe* was going to be then set up for Medicaid funding for abortion. Which some people felt would risk coercing women into having abortions when they didn't really want them. But when the court decided *McRae*, the case came out the other way. And then I realized that my perception of it had been altogether wrong."**

a. When Justice Ginsburg spoke of abortion advocates' hope that legalized abortion would reduce 'populations that we don't want to have too many of,' what populations do you think that she was talking about?
b. Do you think that it is appropriate for the legislators and judges who make abortion policy to craft such policies with an eye towards reducing the size of particular populations that they view as undesirable?

Response: I cannot speak for Justice Ginsburg in interpreting her statement. I do not think it is the role of a judge to make policy, or to advise legislators on the appropriate grounds for crafting policy.

2. In response to questions from Senator Graham about the Puerto Rican Legal Defense and Education Fund (PRLDEF) and its briefs in abortion cases, you said "[t]o the extent that we looked at the organization's legal work, it was to ensure that it was consistent with the broad mission statement of the fund." You also said that "[t]he issue was whether the law was settled on what issues the fund was advocating on behalf of the community it represented . . . . And so, the question would become, was there a good faith basis for whatever arguments they were making[.]" As several Senators noted, you served on the Board of an organization that filed briefs in the most notable abortion cases between 1980 and 1992. All of those briefs took a similar approach and opposed any limitations—even modest limitations—on abortion.

In 1980, when less than 30% of the population believed that abortions should be legal under any circumstance,[1] your organization asserted that the Supreme Court's opinions

[1] http://www.gallup.com/poll/118399/more-americans-pro-life-than-pro-choice-first-time.aspx

upholding limits on the use of Medicaid funds "sanction[ed] as constitutionally reasonable and legitimate an unspeakably cruel sacrifice of the lives of and health of poor women."

a. Was this argument consistent with PRLDEF's policy regarding the constitutional right to abortion?
b. Do you believe "the law was settled" so that "there [was] a good faith basis" to make this argument?

Response: As a member of the board of the Puerto Rican Legal Defense and Education Fund, I did not write, edit, or approve briefs drafted by the organization's staff lawyers. While the board was responsible for ensuring that the broad areas of litigation were consistent with the mission statement of the Fund, the board did not review the briefs in cases selected by the staff lawyers, nor the individual arguments made by those lawyers in briefs filed on behalf of the Fund. Because I was not involved in the drafting or editing of this brief, I cannot speak either to the relationship between arguments raised in the brief and PRLDEF policy or to the good faith legal basis for the arguments.

Rule 3.1 of the ABA Model Rules of Professional Conduct states that a "lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law." Rule 11 of the Federal Rules of Civil Procedure requires that an attorney make legal arguments that are "warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law." Earlier versions of Rule 11, which were in effect at the time I sat on the PRLDEF board, likewise prohibited attorneys from making frivolous arguments, or arguments which lacked "good ground" or a "good faith" basis. *See* Fed. R. Civ. P. 11 (2009); *see also* Fed. R. Civ. P. 11 (1983).

3. On two different occasions, PRLDEF argued that restricting access to abortions was tantamount to slavery. In 1980, for example, PRLDEF joined an unusual *amicus* brief that argued it was unconstitutional not to use federal funds to pay for abortions. In that brief, your organization stated "[j]ust as *Dred Scott v. Sanford* refused citizenship to Black people, these opinions strip the poor of meaningful citizenship under the fundamental law." PRLDEF thereby compared slavery to a lack of taxpayer dollars to fund abortions. PRLDEF made a similar argument in an *amicus* brief in *Planned Parenthood v. Casey*.

a. Do you believe "the law was settled" so that "there [was] a good faith basis" to make this argument?
b. Do you find the argument made in PRLDEF's brief to be offensive?

Response: As a member of the board of the Puerto Rican Legal Defense and Education Fund, I did not write, edit, approve, or sign briefs drafted by the organization's staff lawyers. While the board was responsible for ensuring that the broad areas of litigation were consistent with the mission statement of the Fund, the board did not review the briefs in cases selected by the staff lawyers, nor the individual arguments made by those lawyers in briefs filed on behalf of the Fund. Because I was not involved in the drafting or editing of this brief, I cannot speak to the

good faith legal basis for the arguments raised in the brief. The Board assumed that the attorneys would comply with Rule 3.1 of the ABA Model Rules of Professional Conduct (or analogous state rules) and Rule 11 of the Federal Rules of Civil Procedure, each of which requires that an attorney's argument be supported by existing law or a "good faith" argument for extending, modifying, or reversing existing law, or a similar standard. I do not find analogies useful as a substitute for legal argument in general or in this particular case.

4. In 1980, your organization also argued that the Hyde Amendment, which requires that taxpayer dollars not be used to fund abortions, "will operate each year to condemn thousands of poor women and their children to an inescapable cycle of poverty, disease and dependency." Do you believe "the law was settled" so that "there [was] a good faith basis" to make this argument?

Response: As a member of the board of the Puerto Rican Legal Defense and Education Fund, I did not write, edit, or approve briefs drafted by the organization's staff lawyers. While the board was responsible for ensuring that the broad areas of litigation were consistent with the mission statement of the Fund, the board did not review the briefs in cases selected by the staff lawyers, nor the individual arguments made by those lawyers in briefs filed on behalf of the Fund. Because I was not involved in the drafting or editing of this brief, I cannot speak to the good faith legal basis for the arguments raised in the brief. The Board assumed that the attorneys would comply with Rule 3.1 of the ABA Model Rules of Professional Conduct (or analogous state rules) and Rule 11 of the Federal Rules of Civil Procedure, each of which requires that an attorney's argument be supported by existing law or a "good faith" argument for extending, modifying, or reversing existing law, or a similar standard.

5. In 1990, PRLDEF joined an *amicus* brief urging the Supreme Court to hear the *Rust v. Sullivan* case. In *Rust*, the Court considered whether the Constitution requires that Federal funds be used to promote or endorse abortion. In its brief, your organization argued that it was not permissible to restrict spending taxpayer dollars on promoting or endorsing abortions. The PRLDEF brief also opposed a requirement for health providers who received federal funds to "provide a pregnant woman with a list of prenatal care providers 'that promote the welfare of mother and unborn child.'" Do you believe "the law was settled" so that "there [was] a good faith basis" to make this argument?

Response: As a member of the board of the Puerto Rican Legal Defense and Education Fund, I did not write, edit, or approve briefs drafted by the organization's staff lawyers. While the board was responsible for ensuring that the broad areas of litigation were consistent with the mission statement of the Fund, the board did not review the briefs in cases selected by the staff lawyers, nor the individual arguments made by those lawyers in briefs filed on behalf of the Fund. Because I was not involved in the drafting or editing of this brief, I cannot speak to the good faith legal basis for the arguments raised in the brief. The Board assumed that the attorneys would comply with Rule 3.1 of the ABA Model Rules of Professional Conduct (or analogous state rules) and Rule 11 of the Federal Rules of Civil Procedure, each of which requires that an attorney's argument be supported by existing law or a "good faith" argument for extending, modifying, or reversing existing law, or a similar standard.

6. In the *Rust* brief, your organization also argued that "the right at the heart" of *Roe v. Wade* is "the right to be free from unwarranted governmental interference in the process of deciding whether or not to bear a child." Your organization has said the Constitution requires Federal and state funding for abortions, prohibits the state from providing information, prohibits having a child tell a parent, and even prohibits giving a patient a list of doctors. Do you believe "the law was settled" so that "there [was] a good faith basis" to make these arguments?

Response: As a member of the board of the Puerto Rican Legal Defense and Education Fund, I did not write, edit, or approve briefs drafted by the organization's staff lawyers. While the board was responsible for ensuring that the broad areas of litigation were consistent with the mission statement of the Fund, the board did not review the briefs in cases selected by the staff lawyers, nor the individual arguments made by those lawyers in briefs filed on behalf of the Fund. Because I was not involved in the drafting or editing of this brief, I cannot speak to the good faith legal basis for the arguments raised in the brief. The Board assumed that the attorneys would comply with Rule 3.1 of the ABA Model Rules of Professional Conduct (or analogous state rules) and Rule 11 of the Federal Rules of Civil Procedure, each of which requires that an attorney's argument be supported by existing law or a "good faith" argument for extending, modifying, or reversing existing law, or a similar standard.

7. In 1989, the Fund joined a Supreme Court *amicus* brief filed in *Ohio v. Akron Center for Reproductive Health*, a case regarding Ohio's decision to require children, in most cases, to notify a parent before having an abortion. This is a very reasonable requirement. Your organization argued, among other things, that "establishment and free exercise clause concerns . . . militate toward the invalidation of" the notification provision at issue. This is an extraordinarily aggressive and novel theory. Do you believe "the law was settled" so that "there [was] a good faith basis" to make this argument?

Response: As a member of the board of the Puerto Rican Legal Defense and Education Fund, I did not write, edit, or approve briefs drafted by the organization's staff lawyers. While the board was responsible for ensuring that the broad areas of litigation were consistent with the mission statement of the Fund, the board did not review the briefs in cases selected by the staff lawyers, nor the individual arguments made by those lawyers in briefs filed on behalf of the Fund. Because I was not involved in the drafting or editing of this brief, I cannot speak to the good faith legal basis for the arguments raised in the brief. The Board assumed that the attorneys would comply with Rule 3.1 of the ABA Model Rules of Professional Conduct (or analogous state rules) and Rule 11 of the Federal Rules of Civil Procedure, each of which requires that an attorney's argument be supported by existing law or a "good faith" argument for extending, modifying, or reversing existing law, or a similar standard.

8. In *Akron*, your organization contrasted the "long-term psychological damage" minors "may suffer" if they have to notify their parents prior to an abortion with the harms arising out of an abortion: "Although having an abortion may be stressful, it rarely leads to long-term emotional distress. In fact, the predominant response among both adult and teenage women following an abortion is generally relief. Periods of regret, depression and guilt, if they occur at all, are mild and diminish rapidly." This argument flies in the

face of common sense and medical and psychological research. Do you believe "the law was settled" so that "there [was] a good faith basis" to make this argument?

Response: As a member of the board of the Puerto Rican Legal Defense and Education Fund, I did not write, edit, or approve briefs drafted by the organization's staff lawyers. While the board was responsible for ensuring that the broad areas of litigation were consistent with the mission statement of the Fund, the board did not review the briefs in cases selected by the staff lawyers, nor the individual arguments made by those lawyers in briefs filed on behalf of the Fund. Because I was not involved in the drafting or editing of this brief, I cannot speak to the good faith legal basis for the arguments raised in the brief. The Board assumed that the attorneys would comply with Rule 3.1 of the ABA Model Rules of Professional Conduct (or analogous state rules) and Rule 11 of the Federal Rules of Civil Procedure, each of which requires that an attorney's argument be supported by existing law or a "good faith" argument for extending, modifying, or reversing existing law, or a similar standard.

9. In March of 1992, while you were still a top policy maker with PRLDEF, your organization joined a Supreme Court *amicus* brief in *Planned Parenthood v. Casey*. In *Casey*, the Court considered whether to overturn *Roe v. Wade*. Your organization's brief argued that, among other things, the "right to privacy is guaranteed to all women, regardless of income, race, or ethnicity . . . . Laws that place obstacles in the path of poor women who have chosen to terminate pregnancy—by imposing delays or procedural obstacles, economic barriers, or other impediments to access—constitute a burden on the privacy rights of poor women." Do you believe "the law was settled" so that "there [was] a good faith basis" to make this argument?

Response: As a member of the board of the Puerto Rican Legal Defense and Education Fund, I did not write, edit, or approve briefs drafted by the organization's staff lawyers. While the board was responsible for ensuring that the broad areas of litigation were consistent with the mission statement of the Fund, the board did not review the briefs in cases selected by the staff lawyers, nor the individual arguments made by those lawyers in briefs filed on behalf of the Fund. Because I was not involved in the drafting or editing of this brief, I cannot speak to the good faith legal basis for the arguments raised in the brief. The Board assumed that the attorneys would comply with Rule 3.1 of the ABA Model Rules of Professional Conduct (or analogous state rules) and Rule 11 of the Federal Rules of Civil Procedure, each of which requires that an attorney's argument be supported by existing law or a "good faith" argument for extending, modifying, or reversing existing law, or a similar standard.

National Security

1. The Second Circuit's *Doe v. Mukasey* panel on which you sat found unconstitutional the provisions of the Patriot Act allowing senior government officials to certify conclusively that the release of certain information by the recipients of National Security Letters would endanger national security. Please explain why you feel that the statutory language indicating that certifications by identified senior government officials "shall be treated as conclusive unless the court finds that the certification was made in bad faith" was unconstitutional. In this regard, please focus on why the review of the process by which the

certification has been made – in good faith or in bad faith – is *per se* constitutionally deficient. Please reflect in answering this question on the fact that there are numerous other, well-established contexts, some implicating constitutional rights and others statutorily-granted rights, where certification by an individual government official receives virtually no judicial scrutiny. What is so different about the *Doe v. Mukasey*-related language?

Response: I believe that Judge Newman's opinion in *Doe v. Mukasey*, 549 F.3d 861 (2008), which I joined, fully explained the basis for the panel's conclusions in this area. First, Judge Newman's opinion interpreted the relevant statutory provision

> to place on the Government the burden to show a 'good' reason to believe that disclosure may result in . . . a harm related to 'an authorized investigation to protect against international terrorism or clandestine intelligence activities,' 18 U.S.C. § 2709(b)(1), . . . and to place on a district court an obligation to make the 'may result' finding only after consideration, albeit deferential, of the Government's explanation concerning the risk of an enumerated harm.

Id. at 881.

Next, the opinion acknowledged that

> [a]ssessing the Government's showing of a good reason to believe that an enumerated harm may result will present a district court with a delicate task. While the court will normally defer to the Government's considered assessment of *why* disclosure in a particular case may result in an enumerated harm related to such grave matters as international terrorism or clandestine intelligence activities, it cannot, consistent with strict scrutiny standards, uphold a nondisclosure requirement on a conclusory assurance that such a likelihood exists. . . . To accept [such a] conclusion without requiring some elaboration would 'cast Article III judges in the role of petty functionaries, persons required to enter as a court judgment an executive officer's decision, but stripped of capacity to evaluate independently whether the executive's decision is correct.' *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 426 (1995).

Id.

After articulating the standard that ought to govern the district court's review, the opinion expressed

> every confidence that district judges can discharge their review responsibility with faithfulness to First Amendment considerations and without intruding on the prerogative of the Executive Branch to exercise its judgment on matters of national security. Such a judgment is not to be second-guessed, but a court must receive some indication that the judgment has been soundly reached.

Id. at 882.

2. While Congress has provided some procedure rules – certification by certain senior government officials and the "bad faith"-grounded judicial review in the Patriot Act's sections challenged in *Doe v. Mukasey* – the substantive aspects of the harm to national security-type determinations lie at the very core of the discretionary authority vested in the President under Article III of the Constitution. Please explain how, in your view, Article III courts are supposed to review the quintessentially discretionary national security-related determinations by Executive Branch officials, short of the judges engaging in making discretionary judgments themselves? What is the constitutional basis for such a discretionary policymaking by the Judiciary?

Response: The Executive Branch has broad authority to act, and the Legislative Branch to legislate, in the interests of national security. The precise nature of the judiciary's role in reviewing those actions depends on the substance and nature of the specific legal constraints at issue. Courts do not sit to second-guess discretionary policy decisions; they interpret and apply the law. In doing so, courts often appropriately accord substantial deference to the decisions and actions of the political branches. At the same time, as Justice O'Connor observed in *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004), "Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake."

3. Please explain why this type of activity is not foreclosed by the constitutional prong of the political question doctrine, since the determination that the release of given information threatens harm to the national security of the United States has been clearly delegated to a coordinate branch of government – the President – and there are no obvious judicially ascertainable standards by which judges can scrutinize such determinations.

Response: In *Doe v. Mukasey*, the Government did not argue that the issues presented were nonjusticiable political questions, and the panel did not address that issue. Rather, both sides in the case identified judicially administrable standards that they argued should govern the interpretation and application of the relevant statutory and constitutional provisions, and the panel reached conclusions on those matters. Specifically, the panel adopted the following standard: "In showing why disclosure would risk an enumerated harm, the Government must at least indicate the nature of the apprehended harm and provide a court with some basis to assure itself (based on *in camera* presentations where appropriate) that the link between disclosure and risk of harm is substantial." 549 F.3d at 881.

4. The Supreme Court in the *Boumedienne* case indicated, as a part of the multi-factor test for determining whether constitutional habeas was available to certain alien enemy combatants held outside the United State, that one of the factors to consider, both as a threshold matter for ascertaining whether the habeas applies at all and how it applies, were the practical difficulties caused by this application. Please explain what types of practical difficulties it would be appropriate to consider for purposes of this analysis. In particular, please focus on why the issue of the impact of the availability of habeas on the United States' ability to prosecute successfully combat operations should not be properly considered as the key element of the practical difficulties-related analysis? Also, please

comment on the extent of deference owed by the courts to the Executive Branch's views about practical difficulties, particularly in the context of their impact on the ongoing combat operations.

Response: The Supreme Court in *Boumediene v. Bush*, 128 S.Ct. 2229 (2008), held that "aliens designated as enemy combatants and detained at the United States Naval Station at Guantanamo Bay, Cuba" are "entitled to the privilege of habeas corpus to challenge the legality of their detention." *Id.* at 2240, 2262. In reaching that conclusion, the Court said that "at least three factors are relevant in determining the reach of the Suspension Clause: (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ." *Id.* at 2259. Whether and how those factors should be applied, including the extent to which the courts should defer to the Executive Branch's views about certain "practical obstacles," are questions currently before the lower courts in cases involving the detention of certain individuals at Bagram Airfield, Afghanistan. These cases could well come before the Supreme Court, and so I would not address the scope or application of the *Boumediene* factors in this context.

Property Rights

1. In your opinion in *Didden*, you characterized the threat from the developer as a "voluntary attempt[] to resolve" the dispute between the parties.

- **a. You stated in your opinion that it looked like a legitimate settlement offer. But when one side calls it blackmail and the other side calls it negotiations, isn't that what juries are for? Why did you deny the property owner a jury trial in this case?**
- **b. How voluntary can any sort of "attempt" to settle a dispute be when one party can have the government take the other party's land? When the government makes a statement that ends in "or we'll condemn your property," is that a voluntary attempt to resolve a conflict?**

Response: *Didden v. Village of Port Chester*, 173 Fed. Appx. 931 (2d Cir. 2006), was decided on the basis that the action was barred by the relevant statute of limitations. Where an action is barred by a statute of limitations, it cannot proceed to a jury.

It is not uncommon for parties to seek to negotiate and settle a sales price rather than proceeding to formal condemnation proceedings. If such negotiations do not result in mutually satisfactory settlement terms, the Takings Clause ensures that the court, rather than the parties, will determine the value of the property.

2. In *Didden*, the oral argument before your panel lasted about an hour. That is an exceptionally long time for any appellate court, especially the Second Circuit. Your panel took a little over a year to issue its ruling. Both of these facts suggest that your panel understood the novelty and importance of this case. Your opinion, however, dealt with the plaintiffs' Fifth Amendment claim in one paragraph.

a. Did you believe that this case was an ordinary takings case?
b. If the landowners' takings claim could be resolved so quickly, why did your panel spend so much time hearing oral argument and drafting its opinion?
c. Why was this opinion not published? It addressed a novel question and novel set of facts. Why did you not allow lower courts to be guided by this case?
d. The *Kelo* case was issued *after* oral argument was completed in *Didden*. Why did your panel not request additional briefing on how *Kelo* applied to this case?

Response: *Didden* was understood by both the trial court and the panel of the Second Circuit that heard the matter to turn on the application of the relevant statute of limitations. The application of a statute of limitations to a set of facts is the sort of ordinary determination that often does not warrant a precedential decision. The panel's handling of the case was in no way unusual or inconsistent with Second Circuit practice. The panel did not request additional briefing after *Kelo* was decided because the statute of limitations issue was dispositive.

Death Penalty

1. As a Board Member for the Puerto Rican Legal Defense and Education Fund, you coauthored a task force position paper opposing the death penalty. This task force report ran through a number of reasons for opposing the death penalty, mentioning everything from the impact on the offender and his family, to world opinion, to Judeo-Christian values. The one thing it does not seem to mention or consider, however, is the victim and his or her family.

a. You signed this anti-death penalty report, which is unequivocal in its opposition to capital punishment. Does this memo reflect your personal opposition to the death penalty when you signed the report in 1981?
b. Do you personally believe that imposition of the death penalty for aggravated first-degree murder is sound policy?
c. Do you have any doubts about or personal opposition to the death penalty?

Response: The PRLDEF Task Force on the Bill to Restore the Death Penalty in New York State was asked to submit a memorandum considering what position the Fund should take on the restoration of the death penalty in New York State. The 1981 memorandum reflects the policy recommendation of the PRLDEF Task Force that the Fund oppose the restoration of the death penalty in New York State. It was not the purpose of the memorandum to reflect my personal views.

Policy considerations about the imposition of the death penalty are determinations for each community and its elected representatives to make by enacting death penalty statutes. The role of a court is limited to reviewing those statutes in specific cases to determine if they are or can be applied in a constitutional manner.

I have no personal views about the death penalty that would interfere with my obligation to apply the law as a judge.

2. In my view, the worst example of judicial activism is found in the death penalty opinions and dissents of Justices Brennan and Marshall, who for twenty years opposed every death sentence that came before the Court because they believed "the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments." Their view was contrary to centuries of precedent and to the very text of the Constitution, which repeatedly makes reference to capital offenses and contemplates that capital punishment will be used. The Fifth Amendment alone makes three separate references to the death penalty. At the time the Constitution was ratified, the death penalty was applied to a wide range of offenses. In fact, it was the usual penalty for some of the offenses mentioned by name in the Constitution, such as treason and piracy.

- **a. Do you agree that Justices Marshall and Brennan were engaged in judicial activism when they ignored the text of the Constitution and centuries of Supreme Court precedent to try to outlaw capital punishment?**
- **b. At your 1997 confirmation hearing to be a circuit judge, you told Senator Thurmond that you would interpret the Constitution by "look[ing] at the Constitution and what it meant at the time." Do you continue to hold this view and believe this is the appropriate way to interpret and apply the Eighth Amendment?**
- **c. Would you agree that based on what the Constitution says about the death penalty, there is no reasonable way to conclude that the Framers intended the Eighth Amendment to bar the death penalty in all cases?**
- **d. Do you believe it would be pure judicial activism – like what Justices Marshall and Brennan did – to conclude that the death penalty categorically violated the constitution?**
- **e. Do you agree that it is settled law that the death penalty is constitutional?**

Response: "Judicial activism" is not a term I use and I cannot comment on its meaning for others.

In deciding how to apply the Eighth Amendment in particular cases, judges appropriately look to the structure and history of the text, including evidence about how the text was understood when drafted and ratified. Where appropriate in a specific case, I would engage in that undertaking. I would also be bound, consistent with the doctrine of *stare decisis*, to follow judicial precedents that have interpreted and applied the constitutional text in question.

The Supreme Court rejected the argument that the death penalty may never be imposed consistent with the Eighth Amendment in *Gregg v. Georgia*, 428 U.S. 153,187 (1976), and I accept that precedent.

3. In your memo, you state that "[c]apital punishment is associated with evident racism in our society." The Fourteenth Amendment's equal protection clause governs and prohibits racist laws.

a. What standards would you impose, and what evidence would you deem sufficient, to uphold an equal protection challenge to the death penalty in a specific case?
b. Do you continue to believe that the death penalty is associated with "evident racism" in the United States?

Response: I would analyze any issue regarding the death penalty in light of the factual context and the arguments presented to the Court. As explained by the Supreme Court, a "defendant who alleges an equal protection violation has the burden of proving the existence of purposeful discrimination." *McCleskey v. Kemp*, 481 U.S. 279, 292-93 (1987). The Supreme Court and lower federal courts have adjudicated many equal protection challenges to capital sentences, and may well be called upon to do so in the future. Therefore, I should not opine on the proper application of the Equal Protection Clause or any other constitutional provision in this context.

The "evident racism" argument was set forth in the 1981 PRLDEF memorandum cited above. As noted in my response to question 1, that memorandum reflected the policy recommendations of the Task Force, not my personal views. I have no personal views about the death penalty that would interfere with my obligation to apply the law as a judge.

4. In your memo you state, "Our present perspective on the meaning of our values in the Judeo-Christian tradition, and the state of humanistic thinking in the world judge capital punishment as a violation of those values."

a. You have strongly advocated in favor of the use of foreign law by American judges. Would you look to the "state of humanistic thinking in the world" if considering a constitutional challenge to the death penalty? How does one assess the "state of humanistic thinking in the world"?

Response: In my view, American courts should not rely on decisions of foreign courts as binding or controlling precedent, except when American law requires a court to do so. In some limited circumstances, decisions of foreign courts can be a source of ideas, just as law review articles or treatises can be sources of ideas. The Supreme Court's Eighth Amendment cases establish how the Court considers constitutional challenges to the death penalty, and I accept those decisions.

5. In your memo, you state that the death penalty "creates inhuman psychological burdens for the offender and his/her family."

a. If the death penalty causes – as you wrote -- "inhuman psychological burdens for the offender and his/her family," how can it survive a challenge under the Eighth Amendment as cruel or unusual punishment?
b. What analysis would you use to evaluate these "inhuman psychological burdens" under the Eighth Amendment?
c. Could you vote to uphold the death penalty as constitutional in light of your personal belief that it "creates inhuman psychological burdens"?

d. You didn't consider victims and their families in your 1981 task force report. Do you believe victim impact is irrelevant to the severity of punishment a court should impose against an offender?

Response: As stated above, the policy recommendation set forth in the 1981 PRLDEF memorandum has no relevance to my consideration of death penalty cases as a judge. The Supreme Court rejected the argument that the death penalty may never be imposed consistent with the Eighth Amendment in *Gregg v. Georgia*, 428 U.S. 153, 187 (1976), and I accept that decision.

Victim impact is certainly relevant to sentencing decisions. A sentencing court is required by statute to impose a sentence that, in part, "reflect[s] the seriousness of the offense," "provide[s] just punishment for the offense," and considers the "nature and circumstances of the offense," 28 U.S.C. § 3553, and the Sentencing Commission has been tasked to consider "the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust." 28 U.S.C. § 994(c)(3).

6. In your memo, you state, "All the major religious organizations have issued public statements opposed to it." And you later refer to the "broad consensus of representative religious and civic organizations" opposed to the death penalty. As a judge or Supreme Court Justice, would you look to "major religious organizations" if you were considering an Eighth Amendment challenge to the death penalty?

Response: As with any other issue that may come before the Supreme Court, I would review the particular facts and arguments presented by the litigants on a case-by-case basis, guided by the Constitution and the Supreme Court's precedent.

7. In your memo, you also state that "The evidence for capital punishment as a deterrent of crime is unconvincing." You later state, again in a conclusory fashion, that "it is unreasonable to think that capital punishment will result in preventing [crime and violence] or diminishing it."

a. Do you believe the problem of crime remains so complex that sentencing policies will have no effect in preventing or diminishing it?
b. Do you believe that more severe sentences as a general matter tend to deter crime?
c. Regardless of your personal beliefs, your statement suggests that there are arguments in favor of the deterrent effect of the death penalty – ones that you described as "unconvincing" and "unreasonable." To someone who believes that capital punishment actually does provide a deterrent effect and that it does reduce crime, would you say that his opinion is "unreasonable"?

Response: The deterrent effect of particular sentences is a policy decision for Congress. The role of a court in reviewing the imposition of a criminal sentence is not to judge the reasonableness of the policy decisions made by Congress in setting that sentence, but rather to evaluate any challenge to the sentence based on the factual record and the applicable precedents.

Criminal Law

1. In *United States v. Falso*, FBI agents searched Mr. Falso's home under a search warrant obtained from a district court judge. The officers in that case obtained a search warrant to search Mr. Falso's home and computer for images of child pornography based on evidence that Mr. Falso's email address had been found on a paid subscription website to access child pornography – and that Mr. Falso had earlier been arrested for sexually abusing a seven year old girl, and pled guilty to injuring a minor child. Mr. Falso conditionally pled guilty to serious child pornography charges and appealed. You voted ultimately to affirm the district court's conviction. But in doing so, you held that the FBI's search of Mr. Falso's home violated his Fourth Amendment rights.

a. When you were a prosecutor, if you were presented with evidence that someone had accessed a paid subscription to a child pornography website, and that the same individual had a prior arrest for molesting a little girl, would you have hesitated to seek a search warrant to search that person's computer and home?
b. Do you think that evidence of potential access to a child porn website and a prior arrest for sexually abusing a little girl would be a good reason to search a home for child pornography?

Response: In *United States v. Falso*, 544 F.3d 110 (2d Cir. 2008), the majority concluded that the affidavit supporting the search warrant for the defendant's home was not supported by probable cause on the facts of the case. That conclusion was based in part on the fact that the affidavit did not allege that the defendant subscribed to the website at issue, or even that he had actually gained access to the site. The majority also concluded that the evidence seized during the search was nevertheless admissible under the good-faith exception to the exclusionary rule. My decisions as a prosecutor regarding when to seek a search warrant were fact specific. Whether a particular set of facts would provide probable cause to conduct a search of a home would depend on the individual circumstances of the particular case.

Foreign Law

1. In your testimony on July 14, 2009, you stated, "American law does not permit the use of foreign law or international law to interpret the Constitution. That's a given. And my speech explained that – as you noted – explicitly. There is no debate on that question, there's no issue about that question." However, in your speech before the Puerto Rico chapter of the ACLU (PRCLU) on April 28, 2009, stated the following:

> **"We consider the ideas that are suggested by international and foreign law." As to "the question of whether American judges should listen to foreign or international law," you said, "[H]ow can you ask a person to close their ears? Ideas have no boundaries. Ideas are what set our creative juices flowing; they permit us to think."**

Furthermore, you stated, "[T]o suggest to anyone that you can outlaw the use of foreign or international law is a sentiment that's based on a fundamental misunderstanding. What you would be asking American judges to do is to close their minds to good ideas—to some good ideas. . . . [I]deas are ideas, and whatever their source, whether they come from foreign law or international law . . . or any other place, if the idea has validity, if it persuades you—si te compense [Spanish for "If it persuades you"]—then you are going to adopt its reasoning. . . ."

How do you reconcile your statement that American law forbids the use of foreign law or international law to interpret the Constitution and your statements in your PRCLU speech, such as your statement that to "outlaw the use of foreign or international law is a sentiment that's based on a fundamental misunderstanding?"

Response: As I said in the speech, "we don't use foreign and international law. We consider the ideas that are in foreign and international law. That's a very different concept." In my view, American courts should not "use" foreign law, in the sense of relying on decisions of foreign courts as binding or controlling precedent, except when American law requires a court to do so, as in some cases raising conflicts of law issues or treaty interpretations. In limited circumstances, decisions of foreign courts can be sources of ideas, just as law review articles or treatises can be sources of ideas. Reading the decisions of foreign courts for ideas, however, does not constitute "using" those decisions to decide cases.

2. In your PRCLU speech you favorably cited two infamous Supreme Court decisions, *Roper v. Simmons* (overturning death penalty for juveniles) and *Lawrence v. Texas* (overturning laws against same-sex sodomy) as typical examples of how an American judge may use foreign law in constitutional cases to overturn American statutes. Did the Supreme Court use foreign law to interpret the Constitution in *Roper* and *Lawrence*?

Response: In *Roper v. Simmons*, 543 U.S. 551 (2005), and *Lawrence v. Texas*, 539 U.S. 558 (2003), the Supreme Court cited decisions of foreign courts, but not as controlling authority. Because these cases concern issues that may come before the Court in the future, I would not comment on the reasoning used by the Court to reach its conclusions in those cases.

3. In your PRCLU speech, you stated, "[Courts] were just using that law to help us understand what the concepts meant to other countries, and to help us understand whether our understanding of our own constitutional rights fell into the mainstream of human thinking" in reference to the Supreme Court in *Lawrence* and *Roper*. What relevance does the question of how our constitutional rights fall into the mainstream of human thinking have to the interpretation of the Constitution?

Response: The interpretation of the Constitution is not guided by how our constitutional rights fall into the mainstream of human thinking. For that reason, American courts should not rely on decisions of foreign courts as binding or controlling precedent on questions of constitutional interpretation. In limited circumstances, decisions of foreign courts can be a source of ideas informing our understanding of our own constitutional rights.

4. In your hearing testimony on July 14, 2009, you stated, "It's important that in the speech I gave, I noted and agreed with Justices Scalia and Thomas that one has to think about this issue very carefully because there are so many differences in foreign law from American law. But that was the setting of my speech and the discussion that my speech was addressing." However, in your PRCLU speech, you said that Justice Scalia and Justice Thomas have "unfortunately endorsed" what you claimed is "the misunderstanding of the American use of that concept of using foreign law."

a. How do you reconcile the statement that you agreed with Justice Scalia and Justice Thomas with your statement that Justice Scalia and Justice Thomas "endorsed" the "misunderstanding" of the use of foreign law?
b. Why do you believe that Justice Scalia and Justice Thomas misunderstand the use of foreign law?

Response: As I explained in my speech, I believe that Justices Scalia and Thomas have "a somewhat valid point" on this issue. In particular, their argument that, because "there are so many international and foreign laws that a judge can look to a law of any country to support his or her own conclusion, because they'll find somebody to agree with them" is "validly taken." At the same time, I also explained in my speech that, in my view, this criticism does not support the conclusion that American judges should ignore entirely the decisions of foreign courts. In some limited circumstances, decisions of foreign courts can be a source of ideas, just as law review articles or treatises can be sources of ideas.

5. In your PRCLU speech, you said that "[Justices Scalia and Thomas] have a somewhat valid point. They argue that because there are so many international and foreign laws, so many of them vary, that a judge can look to the law of any country to support his or her own conclusion, because they'll find somebody who will agree with them. So it's easy to say, this is good idea because England likes it, forgetting to mention that Russia doesn't, that Russian law doesn't. Or vice versa. It is a point that is validly taken." How do you respond to this criticism of the use of foreign law by Justice Scalia and Justice Thomas?

Response: Please see my response to question 4.

6. In your hearing testimony on July 14, 2009, you stated, "The question of use of foreign law then is different than considering the ideas that it may on an academic level provide. Judges, and I'm not using my words, I'm using Justice Ginsburg's words, you build up your story of knowledge as a person, as a judge, as a human being with everything you read . . . . You use decisions from other courts – you build up your story of knowledge."

In your hearing testimony on July 15, 2009, you stated,

> **"What I pointed out to in that speech is that there's a public misunderstanding of the word 'use.' And what I was talking about, one doesn't use those things in the sense of coming to a legal conclusion in a case.**

What judges do – and I cited Justice Ginsberg – is educate themselves. They build up a story of knowledge about legal thinking, about approaches that one might consider. . .

But that's just thinking. It's an academic discussion when you're talking about -- thinking about ideas than it is how most people think about the citation of foreign law in a decision. They assume that a – if – if there's a citation to foreign law, that's driving the conclusion. . .

In my experience, when I've seen other judges cite to foreign law, they're not using it to drive the conclusion. They're using just to point something out about a comparison between American law or foreign law, but they're not using it in the sense of compelling a result."

However, in your PRCLU speech, you stated "I share more the ideas of Justice Ginsburg . . . in believing, that unless American courts are more open to discussing the ideas raised by foreign cases, and by international cases, that we are going to lose influence in the world." You warned that the United States would lose influence unless it discussed the ideas from foreign law. You said "Justice Ginsburg has explained, very recently, . . . that foreign opinions . . . can add to the story of knowledge relevant to the solution of a question. And she's right. We have looked, in some Supreme Court decisions, to foreign law to help us decide our issues" and cited *Lawrence* and *Roper* as typical examples. Thus you said that foreign law is not just for pleasure reading but for solving legal problems.

a. How do you reconcile your statements that foreign law is used only at an "academic level" and your statement that foreign law is used "to help us decide our issues?"

b. In what sense do you agree with Justice Scalia and Justice Thomas with respect to the use of foreign law in the interpretation of the Constitution and in what sense do you agree with Justice Ginsburg?

Response: Both my testimony and my speech distinguished between, on the one hand, using foreign law as binding or controlling legal authority to decide a case, and, on the other hand, considering the decisions of foreign courts in some limited circumstances as a source of ideas. I agree with Justices Scalia and Thomas that foreign law should not be used as binding or controlling legal authority to interpret the Constitution. And I agree with Justice Ginsburg that, in limited circumstances, the decisions of foreign courts can be a source of ideas.

7. In your hearing testimony on July 14, 2009, you stated "[W]hile foreign law . . . [except in treaty interpretation] is not binding, it's American principles of construction that are binding." However, in your PRCLU speech, you stated, ". . . [I]nternational law and foreign law will be very important in the discussion of how we think about the unsettled issues in our own legal system. It is my hope that judges everywhere will continue to do this because . . . *within the American legal system we're commanded to*

interpret our law in the best way we can, and that means looking to what other, anyone has said to see if it has persuasive value." **(Emphasis added.)**

a. **How do you reconcile these two statements: "foreign law . . . is not binding," rather "American principles of construction . . . are binding" *versus* "within the American legal system we're commanded to interpret our law in the best way we can, and that means looking to what . . . anyone has said to see if it has persuasive value"?**
b. **Do you believe that the American legal system commands judges to look for "persuasive value" from foreign law to interpret the Constitution and statutes?**

Response: Both my testimony and my speech distinguished between, on the one hand, using foreign law as binding or controlling legal authority to decide a case, and, on the other hand, considering the decisions of foreign courts in some limited circumstances as a source of ideas. As I said in the speech, "we don't use foreign and international law. We consider the ideas that are in foreign and international law. That's a very different concept." The American legal system does not command judges to look for ideas in foreign law, any more than it commands judges to look for ideas in law review articles or legal treatises.

8. In your hearing testimony on July 15, 2009, in response to a question regarding your citation of authority from the Constitution or statutes to use foreign law in interpreting the Constitution or statutes, you said:

> **"My speech and my record on this issue is I've never used it to interpret the Constitution or to interpret American statutes is that there is none. My speech has made that very clear. . .**
> **Unless the statute requires or directs you to look at foreign law. And some do, by the way. The answer is no. Foreign law cannot be used as a holding or a precedent or to bind or to influence the outcome of a legal decision interpreting the Constitution or American law that doesn't direct you to that law. . .**
> **"There is none. If you look at my speech, you'll see that repeatedly I pointed out both that the American legal system that structured not to use foreign law. It repeatedly underscored that foreign law could not be used as a holding, as precedent, or to interpret the Constitution or the statutes."**

As discussed above, in your speech, you stated that the American legal system "commands" you to look at foreign law, describe its usefulness as a source of "good ideas," list as typical examples *Lawrence* and *Roper*, and warn that the United States will lose "influence" in the world if judges do not use foreign law.

a. **How do you reconcile your hearing testimony on July 15, 2009, with your PRCLU speech arguing that there is legal authority to use foreign law in interpreting the Constitution and statutes?**
b. **What is that legal authority, if it exists?**

Response: In my view, American courts should not rely on decisions of foreign courts as binding or controlling precedent, except when American law requires a court to do so. In limited circumstances, decisions of foreign courts can be a source of ideas, just as law review articles or treatises can be sources of ideas. The American legal system does not "command" judges to look to foreign law. Rather, the American legal system commands courts to interpret the law by applying the law to the facts of the cases that come before them.

9. In your hearing testimony on July 15, 2009, you said: "We don't render decisions to -- we don't render decisions to please the home crowd or any other crowd. I know that, because I've heard speeches by a number of justices, that in the past justices have indicated that the Supreme Court hasn't taken many treaty cases and that maybe it should think about doing that, because we're not participating in the discussion among countries on treaty provisions that are ambiguous. . . . That may be of consideration in -- to some justices. Some have expressed that as a consideration. My point is, you don't rule to please any crowd. You rule to get the law right under its terms." However, previously, as discussed above, you made it clear that courts need to look at foreign law to make decisions because if it does not, then the United States will "lose influence in the world." How do you reconcile your statement that it does not matter what other countries think of United States legal decision making process with your statement that the United States will lose influence in the world unless it looks at foreign law?

Response: In my view, American courts should not rely on decisions of foreign courts as binding or controlling precedent, except when American law requires a court to do so. In limited circumstances, decisions of foreign courts can be a source of ideas. To the extent that American courts categorically refuse to consider the ideas expressed in the decisions of foreign courts, it may be that foreign courts will be less likely to look to American law as a source of ideas. That does not mean that American courts should issue decisions intended to improve the United States' influence in the world. American courts should issue decisions interpreting the law by applying the law to the facts of the cases that come before them. To the extent that the decisions of foreign courts contain ideas that are be helpful to that task, American courts may wish to consider those ideas. But American courts should not do so merely to improve the United States' influence in the world.

10. You wrote, "[T]he question of how much we have to learn from foreign law and the international community when interpreting our Constitution is not the only one worth posing." Judge Sonia Sotomayor, *Foreword*, in Daniel Terris, Cesare P.R. Romano & Leigh Swigart, THE INTERNATIONAL JUDGE, ix (2007). What specifically have you learned and do you intend to learn "from foreign law and the international community when interpreting our Constitution?'

Response: In my seventeen years as a federal judge, I have never used or considered foreign law in interpreting the Constitution.

11. You wrote "[W]e should also question how much we have to learn from international courts and from their male and female judges about the process of judging

and the factors outside of the law that influence our decisions." ***Id.***

a. What specifically have you learned and do you intend to learn regarding the "process of judging and the factors outside of the law that influence [your] decisions"?
b. How do you intend to apply what you learn from foreign judges to your work as an American judge?

Response: *The International Judge* is a collection of academic essays in the field of comparative law. As I noted in my foreword to that book, there are many interesting questions for academics to consider in this field. I am not, however, a comparative law scholar, and I do not spend my time studying these questions. As for how I apply the work of foreign courts to my duties as a judge, I have not, and do not intend to, rely on decisions of foreign courts as binding or controlling precedent, except when American law requires a court to do so. In limited circumstances, decisions of foreign courts can be a source of ideas for American judges, just as law review articles or treatises can be sources of ideas.

12. In an interview given after your nomination to the Supreme Court it was reported that "[Judge Sotomayor] favors the use of international laws as a point of reference and as part of the broad process of reflection of the United States courts because 'the consideration of ideas has no borders,' and conveyed that she on principle opposes this practice 'because I haven't the guts to flip someone off.'" Cynthia López Cabán, ***Sería un regalo maravilloso*****, EL NUEVO DIA, 6 (May 2, 2009) ("It Would Be a Wonderful Gift," translated from Spanish) (quoting Judge Sotomayor).**

a. Was this passage translated correctly? If not, please provide an accurate translation.

b. What did you mean by your quote in this passage: "she on principle opposes this practice 'because I haven't the guts to flip someone off.'"? ***Id.***

Response: In limited circumstances, decisions of foreign courts can be a source of ideas for American judges, just as law review articles or treatises can be sources of ideas. In the quoted language, I was informally expressing my view that I would not refuse to consider an idea that could be helpful simply because that idea was articulated in a decision of a foreign court, any more than I would refuse to consider an idea simply because that idea was articulated in a law review article or a treatise.

13. In your speech, ***Judicial Independence: What It Takes to Maintain It*****, you wrote favorably of French judicial decision making: "In terms of actual decision-making, judicial panels in France issue only one decision. Unlike court in the United States, dissenting opinions are very rare. With a single decision, there is less pressure on individual judges and less fear of reprisal for unpopular decisions." Judge Sonia Sotomayor & Jennifer Peng,** ***Judicial Independence: What It Takes to Maintain It*****, Speech Given at the Colegio de Abogados de Puerto Rico Asamblea Annual 1999, 12-13 (Sept. 11, 1999) ("Bar Association of Puerto Rico Annual Assembly"). Does your frequent participation in panels that issued**

unsigned *per curiam* opinions and summary orders reflect your agreement with this French practice?

Response: The use of unsigned, *per curiam* opinions and summary orders by panels of which I am a member reflects customary Second Circuit practice, not any personal views about the practice of any foreign court.

14. Law professor William D. Popkin wrote the following:

> **Along with a requirement of writing and officially reporting opinions went an explicit requirement that French judges give reasons for their conclusions. Only in that way (the theory went) could judges be held accountable for their actions. . . . There is, however, a significant irony in the way the French implement this requirement. French judges give a relatively bare-bones statement of law, facts, and reasoning; opinions are laconic—what John Dawson calls the equivalent of flashing a policeman's badge. . . . The irony about French judicial opinion writing is that minimal reason-giving allows French judges to conceal a bold judicial lawmaking role, perhaps even bolder than in the case of United States and English judges because of the lack of any formal notion of precedent. William D. Popkin, EVOLUTION OF THE JUDICIAL OPINION, 38.**

a. Do you agree with this description of French judicial decision-making? If not, please explain why.
b. Do you agree with this statement: "With a single decision, there is less pressure on individual judges and less fear of reprisal for unpopular decisions"?

Response: Because I am only generally familiar with some foreign courts' procedures for decision-making, I would not opine on an academic's detailed evaluation of the workings of another country's judiciary. My statement regarding "unpopular decisions" appeared in a speech that I delivered on September 11, 1999 at the Colegio de Abogados de Puerto Rico Asamblea on the topic of judicial independence. That statement was made in a section of the speech in which I discussed the judicial institutions of other countries, and simply described one aspect of the French judicial system. I did not opine on the merits of that aspect of the French judicial system, or on any other aspect of any of the foreign judicial systems discussed in the speech.

First Amendment

1. In *Landell v. Sorrell* (2d Cir. 2005), you voted to let stand a three-judge panel's decision that restrictions contained in a Vermont campaign finance statute did not violate the First Amendment. The state law placed substantial limits on how much an individual may contribute to a candidate and how much a candidate may spend in a campaign. That second restriction, the limit on expenditures, ran contrary to the Supreme Court's 1976 decision in *Buckley v. Valeo*. Despite this conflict with Supreme Court precedent, you voted not to rehear the case. Justice Breyer, writing for the Supreme Court, eventually reversed the panel decision that you voted to uphold. In explaining why you voted not to rehear this

case, you joined a concurrence saying that "[t]he issue for us, of course, is not whether the opinion for the panel majority or the dissent was right . . . . The issue for us, then, is whether to grant a rehearing *en banc* because the proceeding involves a question of exceptional importance."

a. Does this statement in the concurrence mean that you concluded that substantial limitations on political expression were not issues of "exceptional importance"?
b. Based on the differing opinions in this case, it appears that circuit judges substantively disagreed as to whether the statute violated the First Amendment. How is this not a "question of exceptional importance"?
c. What if there was a similar disagreement regarding the Second Amendment? Would that case be worthy of rehearing?
d. What about the Fifth Amendment? Would that be an issue of "exceptional importance" and worthy of rehearing?
e. What about the right to an abortion? Would that be an issue of "exceptional importance" and worthy of rehearing?

Response: My vote to deny rehearing en banc in *Landell v. Sorrell* was based on a number of factors, which were set forth in the opinion joined by me and by Judges Sack, Katzmann, and Parker. *Landell v. Sorrell*, 406 F.3d 159, 166 (2d Cir. 2005) (Sack and Katzmann, J.J., concurring in the decision to deny rehearing en banc.) That opinion recognized that "the issue of campaign finance and its relationship to First Amendment protection for political expression is obviously important, at least as a general matter." *Id.* The opinion also noted, however, that the Supreme Court might grant *certiorari* in the case, and en banc review by the Second Circuit would not meaningfully assist the Supreme Court in its decision-making. Moreover, if the Supreme Court did not grant *certiorari*, further proceedings in the district court would better focus any additional review of the case by the Second Circuit. Whether and how these considerations might apply in another case raising a different constitutional issue would depend on the facts and procedural posture of the case.

2. You voted for *en banc* review in *Koehler v. Bank of Bermuda* (2d Cir. 2000), which addressed whether Bermuda corporations and citizens are "citizens or subjects of a foreign state" and subject to a particular kind of federal jurisdiction. In your dissent from the court's denial of *en banc*, you described the case as "exceptional[ly] important[t]" and emphasized that its importance "reaches well beyond our government, to our relations with foreign nations, and the access of foreign entities and individuals to the federal courts."

a. Why did you believe that this case was "exceptional[ly] importan[t]" and deserved *en banc* review but that a case involving substantial limits on political speech did not?

b. Do you believe that cases that touch on "relations with foreign nations" are more "important" than cases that involve core First Amendment questions?

Response: My reasons for dissenting from denial of rehearing en banc in *Koehler v. Bank of Bermuda* are fully set forth in my opinion in that case, which was joined by Judge Leval. 229

F.3d 187 (2000) (Sotomayor, J., dissenting from denial of rehearing en banc). The issues raised by *Koehler* were fundamentally different from the issues raised by *Landell*. As to the basis for my decision to vote to deny rehearing in *Landell*, see my response to question 1.

3. In *Guiles v. Marineau* (2d Cir. 2006), you endorsed the First Amendment rights of a student to wear a shirt containing images of cocaine and alcohol, as well as the word "cocaine." Do you believe that a student's First Amendment right to wear a shirt displaying images of drugs and alcohol is stronger than the right of a private law-abiding citizen to participate in a political campaign?

Response: In *Guiles v. Marineau*, 461 F.3d 320 (2d Cir. 2006), the court unanimously concluded that the school's decision to discipline a student for wearing a t-shirt that criticized the President violated the First Amendment. The basis for the court's decision is set forth in its opinion, which was written by Judge Cardamone. *Guiles* did not present the question whether the student's First Amendment rights were "stronger" than the right of a citizen to participate in a political campaign. Each case raised distinct First Amendment concerns.

Hayden v. Pataki

1. In *Hayden v. Pataki*, 449 F.3d 305 (2d Cir. 2006) (*en banc*), the Second Circuit, *en banc*, held that imprisoned felons were not disenfranchised on account of race under the Voting Rights Act just because they are in prison and cannot vote. You dissented from the majority opinion, joining Judge Parker's dissent, and authoring your own dissent, and would have held that New York's felon disenfranchisement law was unconstitutional under the Fifteenth Amendment.

- **a. Doesn't your dissent in *Hayden* ignore the fact that the convicts' crimes and not any state-based racial discrimination made the felons ineligible to vote?**
- **b. Based on the dissent you joined, do you believe that the whole prison system is racist?**

Response: The issue in *Hayden v. Pataki*, 449 F.3d 305 (2d Cir. 2006), was whether New York's felon disenfranchisement law fell within the scope of Section 2 of the Voting Rights Act (VRA). That provision states that "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied in any State . . . in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race and color." 42 U.S.C. § 1973(a). My dissent in that case rested on my reading of the plain terms of the statute, which applies to all voting qualifications or prerequisites to voting. I concluded, based on the unambiguous terms of Section 2, that a law disqualifying felons from voting constitutes a "voting qualification" and therefore falls within the scope of the VRA. As I explained in my dissent: "The duty of a judge is to follow the law, not to question its plain terms. I do not believe that Congress wishes us to disregard the plain language of any statute or to invent exceptions to the statutes it has created." 449 F.3d at 368.

My dissenting opinion did not conclude that New York's law violated the Fifteenth Amendment. Instead, I took the position that, because the district court had entered judgment for the

defendants based only on the parties' pleadings, our Court should have given the plaintiffs the opportunity to undertake factual discovery and to present evidence in support of their allegations.

My dissent did not express a view on whether the entire prison system is racist, and I do not believe that it is.

2. Do you believe that in adopting the Voting Rights Act, Congress intended to require states to install voting booths in prisons?

Response: Actions challenging felon disenfranchisement laws are currently pending in the lower courts. *See, e.g., Farrakhan v. Gregoire*, No. CV-96-076-RHW, 2006 WL 1889273 (E.D. Wash. 2006) (currently on appeal before the Ninth Circuit); *Simmons v. Galvin*, No. 01-11040-MLW, 2007 WL 2507740 (D. Mass. 2007) (currently on appeal before the First Circuit). If a court found that a particular felon disenfranchisement law violated the Constitution or a federal statute, the question of remedy would be a separate consideration. Because these issues could come before the Supreme Court, I would not comment further.

Belizean Grove

1. Up until immediately prior to your nomination to be an Associate Justice of the United States Supreme Court, you were a member of the Belizean Grove, an all-female networking club. In *Sotomayor Found Friends in Elite Group*, a June 4, 2009 article in *Politico*, Kenneth P. Vogel described the Belizean Grove as an "elite but little-known women's-only group." According to its mission statement, "the Belizean Grove is a constellation of influential women who are key decision makers in the profit, non-profit and social sectors; who build long term mutually beneficial relationships in order to both take charge of their own destinies and help others to do the same." The group was formed in 1999 as an answer to the Bohemian Grove, a San Francisco-based men's club. According to the group's founder, no man has ever applied for membership. You attended the group's retreat in Lima, Peru last year. In fact, although you gave a presentation at the retreat on "the challenges the judiciary faces in maintaining its independence from the legislative and executive branches," you did not include those remarks when you submitted your questionnaire to this Committee.

You wrote a letter to Senator Leahy and me on June 19th, informing us that you had resigned from the Belizean Grove. You have maintained that the group does not invidiously discriminate on the basis of sex, and that your membership did not violate the Code of Judicial Conduct. Canon 2C of the Code of Judicial Conduct states that "[a] judge should not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin." The rule provides additional guidance, stating that, "Whether an organization practices invidious discrimination is often a complex question to which judges should be sensitive."

In the past, the Senate Judiciary Committee has been hard on judicial nominees who belong to exclusive clubs. In fact, a Committee Resolution from 1990 stated that "membership in such discriminatory clubs conflicts with the appearance of impartiality

standard required of persons who may serve in positions in the Federal judiciary or the Department of Justice." It went on to say that it was "inappropriate" for a nominee to be a member of such a club "unless such persons are actively engaged in bona fide efforts to eliminate the discriminatory practices." It noted that the "such membership is an important factor which Senators should consider in evaluating such persons, in conjunction with other factors which may reflect upon their fitness and ability."

a. **Why you believe that the Belizean Grove does not invidiously discriminate on the basis of gender?**
b. **How was your membership in this organization any different than that of other candidates like Judge D. Brooks Smith, who was forced to resign from an all-male fishing club?**
c. **Did you ever make any efforts to eliminate the club's discriminatory policy?**
d. **Please explain why your membership did not violate the Code of Judicial Conduct.**
e. **If you believe that your membership in this organization did not violate the Code of Judicial Conduct, please explain why you resigned.**

Response: In my view, the Belizean Grove does not invidiously discriminate on the basis of gender. The group allows men to participate in Belizean Grove activities, and to my knowledge the Belizean Grove has never denied membership to a man seeking admission. Because the Belizean Grove does not practice invidious discrimination on the basis of gender, I did not see the need for any efforts on my part to change the policies of the organization, nor did my membership violate the Code of Judicial Conduct. Nevertheless, because my membership raised concerns on the part of Senators considering my nomination to the Supreme Court, I resigned from the organization. I am not familiar with the circumstances surrounding Judge Smith's fishing club membership, and therefore I am not in a position to compare our respective situations.

Process

1. Please describe with particularity the process by which these questions were answered.

Response: Responses to these questions were drafted by legal staff of the White House based on my guidance. I edited these draft responses, and gave final approval to all answers.

2. Do these answers reflect your true and personal views?

Response: Yes.

Responses of Judge Sonia Sotomayor
to the Written Questions of Senator Chuck Grassley

1. Last year the Supreme Court held in *District of Columbia, et al. v. Heller*, that the Second Amendment includes an individual right to possess a firearm independent of the prefatory clause regarding militias. In *Maloney v. Cuomo*, you joined a *per curiam* opinion that held that the Second Amendment "applies only to limitations the federal government seeks to impose on this right." The opinion you joined reached this conclusion citing *Presser v. Illinois*, a case from 1886 that held the Second Amendment right to bear arms "imposes a limitation on only federal not state, legislative efforts."

While the *Maloney* opinion relied upon *Presser*, it did note a very important footnote the Supreme Court included in the *Heller* decision. Footnote 23 stated that *Cruikshank*—another early Supreme Court decision finding that the Second Amendment applies to only Congress, not the states—was decided before the Court adopted the incorporation of the bill of rights to the states. In fact, the Supreme Court in *Cruikshank* didn't believe the First Amendment applied to the states, something we wouldn't even think of today. Footnote 23 in *Heller* signals that *Cruikshank*, and its progeny, including *Presser*, all predate the doctrine of incorporation and "did not engage in the sort of Fourteenth Amendment inquiry required by our later cases."

- **Do you believe that the Second Amendment is a fundamental right that should be incorporated to the states via the Fourteenth Amendment's Due Process Clause?**
- **Do you believe the Second Amendment should be incorporated by the Privileges or Immunities Clause of the Fourteenth Amendment?**
- **Why did the *per curiam* opinion in *Maloney* that you joined fail to address the issue of incorporation?**
- **Earlier this year, the Ninth Circuit Court of Appeals reached the opposite conclusion as you and your colleagues in the Second Circuit did in *Maloney*. In *Nordyke v. King*, the Ninth Circuit held that rejected the rigid reliance on *Cruikshank* and its progeny—including *Presser*—and held that the Second Amendment is incorporated to the states via the Fourteenth Amendment. The Ninth Circuit reached this conclusion by conducting the Fourteenth Amendment analysis required by later cases as the Supreme Court noted in Footnote 23. Do you agree or disagree with the Ninth Circuit's reasoning in *Nordyke*?**
- **Why did the Ninth Circuit in *Nordyke* conduct the Fourteenth Amendment analysis indicated by Footnote 23 in *Heller* while your panel in the Second Circuit in *Maloney* did not? Do you believe the Second Circuit panel you sat on should have conducted that analysis?**

Response: The opinion in *Maloney v. Cuomo*, 554 F.3d 56 (2d Cir. 2009) (*per curiam*), concluded that the panel was bound by Supreme Court and Second Circuit precedent holding that the Second Amendment is not incorporated against the States. *Id*. at 58 (citing *Presser v. Illinois*, 116 U.S. 252 (1886); *Bach v. Pataki*, 408 F.3d 75 (2d Cir. 2005), *cert. denied*, 546 U.S. 1174 (2006)).

The question whether the Second Amendment is incorporated against the States by the Fourteenth Amendment's Due Process Clause is the subject of a circuit split. *Compare Nat'l Rifle Ass'n of America, Inc. v. City of Chicago*, 567 F.3d 856 (7th Cir. 2009), *and Maloney v. Cuomo*, 554 F.3d 56 (2d Cir. 2009), *with Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009). Two petitions for *certiorari* currently raise the question before the Court. Accordingly, I cannot express my views on the merits of this issue, other than to reiterate, as I said during the hearings, that I have an open mind on this question.

2. From 1980 to 1992, you served as a board member of the Puerto Rican Legal Defense and Education Fund (PRLDEF). During that period PRLDEF was involved in numerous abortion cases and consistently argued before the Supreme Court that the scope of the abortion rights pronounced in *Roe v. Wade* should not be reduced in any way.

- **Why did the PRLDEF believe that defending *Roe* was a good way to spend its limited resources when numerous pro-abortion legal groups would be filing supporting briefs? What is the link between Puerto Rican legal interests and abortion?**
- **While you were associated with PRLDEF, it filed six briefs in five abortion related cases before the United States Supreme Court. Did you express any disagreement with the content of those briefs? Do you disagree with the content of those briefs now?**
- **You served as the Chairman of the Litigation Committee for PRLDEF for several years. In that capacity, did you review any of these abortion related cases that were filed by PRLDEF? Were you involved in any abortion policy or litigation strategy? What did you do as the head of the PRLDEF Litigation Committee if not be involved with and knowledgeable of the litigation activities of the Fund?**

Response: As a member of the board of the Puerto Rican Legal Defense and Education Fund ("PRLDEF"), I did not write, edit, or approve briefs drafted by the organization's staff lawyers. While the board was responsible for ensuring that the broad areas of litigation were consistent with the Fund's mission statement, the board reviewed neither the briefs in cases selected by the staff lawyers, nor the individual arguments made by those lawyers in briefs filed on behalf of the Fund. The Board assumed that the attorneys would comply with Rule 3.1 of the ABA Model Rules of Professional Conduct (or analogous state rules) and Rule 11 of the Federal Rules of Civil Procedure, each of which requires that an attorney's argument be supported by existing law or a "good faith" argument for extending, modifying, or reversing existing law, or a similar standard.

The Litigation Committee, like the full Board, focused on issues like resource allocation and ensuring general consistency with the Board's mission statement, but with a more specific focus on the litigation area. For example, as chair of the Litigation Committee, I made recommendations regarding the establishment of a consultant committee to serve as a resource to the litigation staff and regarding the restructuring of the Fund's legal department staff. The Litigation Committee also performed tasks like ensuring access to legal research materials for the staff and reaching out to other Hispanic and civil rights organizations engaged in litigation to discuss common issues. The Committee reviewed the broad areas of litigation in which the Fund

was participating to ensure that those areas were consistent with the Fund's mission statement. The Committee also considered possible additional areas of litigation that might benefit the community PRLDEF served, but this was done at very high levels of generality – whether we should focus on education, voting rights, public health issues, etc. – and did not involve writing or editing specific briefs or litigation materials, which was the role of the staff attorneys.

3. In several of your speeches, you have indicated that you approve of American judges relying on foreign law in making decisions where such reliance is not expressly required. (Speech, ACLU of Puerto Rico, April 2009.)

- **Does the silence of the U.S. Constitution on a legal issue allow a federal court to use foreign law as an authority for judicial decision-making? When is it not appropriate to look to foreign law for legal guidance or legal authority?**

Response: Foreign law should not be used as binding precedent or legal authority to interpret the United States Constitution. In some limited circumstances, decisions of foreign courts can be a source of ideas, just as law review articles or treatises can be sources of ideas.

4. How do you define "judicial restraint?" How do you currently exercise "judicial restraint" on the appeals court? How will you exercise it on the Supreme Court, if you are confirmed to be an Associate Justice?

Response: I eschew the use of labels to describe my role as a judge. I believe that judges have a limited role in our constitutional system of government. It is the task of a judge to apply the law to the facts of the case. That is how I have approached judging throughout my seventeen years on the federal bench, and that is how I would approach my job if I am confirmed to be an Associate Justice of the Supreme Court.

5. Do you support maintaining "settled" law? What if a case becomes "unsettled" or refined by subsequent rulings? Is it possible that a time could be reached when the entire decision should be overruled?

Response: The Supreme Court's precedents are entitled to stare decisis effect. The doctrine of stare decisis promotes evenhandedness, fairness, consistency, predictability, and reliability. The Court, however, has made clear that stare decisis is not an inexorable command. In some circumstances, the Court will revisit its prior precedent. The Court has set forth factors it uses to decide when to do so. Those factors include: whether the prior precedent has proved workable as it has been applied by the lower courts; whether society has come to rely on the Court's decisions in the area of law at issue; whether developments in related areas of the law have undermined the value of the prior precedent; whether the factual premises underlying the prior precedent have changed since the prior case was decided; and whether the Court has reaffirmed the prior case.

6. Do federal courts have the power to perpetuate decisions that are not supported by the Constitution?

Response: The Constitution binds all three branches of government, including the federal courts. Article III of the Constitution obligates the federal courts to decide cases or controversies arising under the Constitution, and in fulfilling this obligation the federal courts are required to apply the Constitution as interpreted by the United States Supreme Court.

7. Since its inception, the Federal Sentencing Commission and the Federal Sentencing Guidelines have faced a number of challenges that have come before the Supreme Court. The Supreme Court upheld the constitutionality of the Sentencing Commission in 1989 which led to the introduction of the Sentencing Guidelines across the country. However, in 2005, the Supreme Court held that the mandatory nature of the Federal Sentencing Guidelines violated defendant's sixth amendment right to a jury trial. This decision in *United States v. Booker* and *United States v. Fanfan* severed the provisions making the guidelines mandatory. As a result, the Court held that the guidelines are not to be considered mandatory and are instead merely advisory.

The Court has continued to find problems with the Sentencing Guidelines and recently stated in *Nelson v. United States*, a *per curiam* opinion, "The Guidelines are not only *not mandatory* on sentencing courts; they are also not to be *presumed* reasonable."

- **Do you agree with the Supreme Court that the Sentencing Guidelines are not mandatory and not entitled to a presumption of reasonableness?**
- **If the Sentencing Guidelines are not mandatory and not entitled to a presumption of reasonableness, in your view, is the Sentencing Commission necessary? Should we instead, just commission universities or academics to do statistical analysis of judicial sentences?**
- **Do you believe that decisions by the Sentencing Commission to amend the Guidelines and impose them retroactively are healthy for the Courts? Do you agree that any retroactive application has the potential to severely disrupt the courts and the executive branch agencies forced to relitigate and rehear settled cases? Why or why not?**

Response: In the four and half years since *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court has consistently confirmed that the Sentencing Guidelines "are now advisory." *Gall v. United States*, 552 U.S. 38 (2007). That holding—and the Supreme Court's repeated reaffirmation of *Booker* since 2005—is binding precedent. The Supreme Court has also directed that a sentencing court "may not presume that the Guidelines range is reasonable," although the Guidelines should be "the initial benchmark" of any sentencing. *Id.* The sentencing court must make an individualized assessment based on the facts presented to craft a sentence sufficient, but not greater than necessary, to fulfill the goals of sentencing generally. *See* 18 U.S.C. §3553(a).

It has been my experience that the advisory Guidelines prove useful as a starting point to consider what an appropriate sentence may be. That is because the Guidelines are the product of considered review and collaborative efforts: the "Guidelines as written reflect the fact that the Sentencing Commission examined tens of thousands of sentences and worked with the help of many others in the law enforcement community over a long period of time." *Rita v. United States*, 551 U.S. 338 (2007). The Supreme Court has recognized that the advisory Guidelines

regime "preserve[s]" the "key role for the Sentencing Commission" that Congress has legislated. *Kimbrough v. United States*, 552 U.S. 85 (2007). As directed by statute, the Commission continues to "formulate and constantly refine national sentencing standards," armed with "empirical data and national experience, guided by a professional staff with appropriate expertise." *Id.* (internal quotation marks omitted). And the Guidelines continue to evolve as the Sentencing Commission reviews sentences imposed by courts, and as it solicits "advice from prosecutors, defenders, law enforcement groups, civil liberties associations, experts in penology and others" in an effort to minimize unwarranted sentencing disparities, while appreciating the individual nuances of a particular case. *Rita*, 551 U.S. 338. Whether the Sentencing Commission continues to be "necessary" is ultimately a question for Congress.

Effective March 3, 2008, the Sentencing Commission voted unanimously to give retroactive effect to an amendment to the Federal Sentencing Guidelines that reduces penalties for some crack cocaine offenses. District and circuit courts are currently examining the impact of *Booker* and retroactive Guidelines provisions on sentencing proceedings under 18 U.S.C. § 3582. For this reason, I would not comment on issues that are likely to come before the Court in the future. Generally speaking, however, it is not a judge's role to question the wisdom of legislative policy choices that are within constitutional limits, even if those choices impose additional burdens on courts or agencies.

8. In a recent U.S. Supreme Court case, *Gant v. Arizona,* the Court put considerable limitations on how search rules under *New York v. Belton* had been interpreted over the years. For nearly 30 years, until this latest reading of the 4th Amendment, law enforcement had used the "bright line" rule created by the *Belton* decision. In his dissent of *Gant,* Justice Breyer said the following:

> **Because the Court has substantially overruled *Belton* and *Thornton*, the Court must explain why its departure from the usual rule of *stare decisis* is justified.**
>
> **While reliance is most important in "cases involving property and contract rights," *Payne, supra,* at 828, 111 S. Ct. 2597, 115 L. Ed. 2d 720, the Court has recognized that reliance by law enforcement officers is also entitled to weight. In *Dickerson*, the Court held that principles of *stare decisis* "weigh[ed]" heavily against overruling *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), because the *Miranda* rule had become "embedded in routine police practice." 530 U.S., at 443, 120 S. Ct. 2326, 147 L. Ed. 2d 405.**

I am concerned about this ruling for the following reasons: a) the Court appeared to have disregarded *stare decisis* on this issue; b) this ruling may have a substantial impact on future law enforcement efforts because police officers have relied on the search conditions previous delineated in the *Belton* case; c) the *Gant* decision in limiting searches incident to arrest has over complicated the common sense judgments we ask of our police every day.

- **As Justice Breyer indicated, the principle of *stare decisis* is also essential to the rules that have been embedded in routine police practice. Do you believe the Court disregarded *stare decisis* in its decision? Do you believe the Court is unduly sending mixed legal messages regarding a search incident to the arrest to our police?**
- **Because of the varying U.S. Supreme Court interpretations of seizure rules for law enforcement officers concerning searches incident to the arrest, do you think that the *Gant* decision may cause police officers to become more reluctant to legitimately seize evidence even in situations where it would permissible under *Gant*? Furthermore, do you believe that the *Gant* ruling jeopardizes convictions for offenders when police officers fail to seize permissible evidence out of the potential uncertainties created by the Court's decision?**
- **How will the *Gant* decision affect local, state and federal prosecutions?**

Response: The Court's holding is binding precedent that must be considered in future cases, and I would not comment on the merits of this recent decision by the Supreme Court.

9. Justice Souter once famously quipped that television cameras would have to "roll over my dead body" in order to gain access to the proceedings before the Supreme Court. As you are filling the seat vacated by Justice Souter, I'd like to hear your views on the topic.

I, and many of my colleagues on this Committee, believe that allowing cameras in the federal courthouse would open the courts to the public and bring about greater accountability. I also think that this openness will help judges do a better job. You probably are aware that for a number of years, I've sponsored a bill, the Sunshine in the Courtroom Act, which gives judges the discretion to allow media coverage of federal court proceedings.

- **Do you share the same view as Justice Souter on allowing television access to the Supreme Court?**
- **What are your thoughts on giving federal judges the discretion to allow the televising and broadcasting of cases?**
- **Have you ever had an appellate court proceeding televised or otherwise released to the press? Have you voted to allow the use of media in any of your proceedings? If so, please explain your involvement.**
- **Would you support opening up the Supreme Court to regular media coverage?**

Response: The use of cameras to televise proceedings in federal courts—including the Supreme Court—is the subject of an ongoing dialogue between Congress and the Supreme Court. I have had limited experience with televising court proceedings as a district court judge, but not as a court of appeals judge. My experience has been positive, and I intend to relay that experience to the Justices on the Supreme Court in future conversations on this issue if I am confirmed.

10. Perhaps no statute has had as many constitutional challenges as the federal False Claims Act. Since I authored major amendments to it in 1986, the statute has been the subject of substantial litigation and many cases have come before the Supreme Court. The Court has largely rejected many of these challenges, including a 2005 decision in *Vermont Agency of Natural Resources v. United States*, holding that *qui tam* relators have Article 3 standing because of the Government's injury in fact. However, some continue to question whether *qui tam* statutes are constitutional under Article 2—interfering with the Executive Branch's ability to prosecute cases.

- **Are you familiar with these arguments?**
- **Do you agree with the Court's reasoning that a *qui tam* relator has Article 3 standing because of the United States' injury in fact? Why or why not?**
- **Do you have an opinion on the arguments that the *qui tam* provisions are unconstitutional because they impede the Executive Branch? If so, what is your opinion and why?**
- **The Framers of the Constitution, in the First Congress, enacted several *qui tam* statutes. What deference do you give this fact when assessing the constitutionality of *qui tam* statutes in the present day?**

Response: I have never heard a case concerning the constitutionality of the *qui tam* provisions of the False Claims Act, and I am only generally familiar with the arguments on this issue. I would not comment on the merits of a recent Supreme Court decision, or comment on issues that might come before me in the future.

11. Looking through your record it appears you never heard a False Claims Act case in your tenure on the federal bench.

- **Are you familiar with the False Claims Act?**
- **Have you ever written or spoken publicly about the False Claims Act?**
- **What about the issue of the constitutionality of the *qui tam* or any other provisions of the False Claims Act? If so, please explain the circumstances and context and whether you wrote anything on the subject or provided anyone with your views on the subject.**
- **Have you ever written about the constitutionality of *qui tam* provisions in any other federal law? If so, please explain the circumstances and the context and whether you wrote anything on the subject or provided anyone with your views on the subject.**
- **Do you feel you have any bias against the False Claims Act that would impact on your ability to fairly decide a case involving the statute? If so, please explain.**

Response: As a Second Circuit judge, I have heard several cases involving the False Claims Act, including *Masters v. GlaxoSmithKline*, 271 Fed. Appx. 46 (2d Cir. 2008); *United States v. New York Medical College*, 252 F.3d 118 (2d Cir. 2001); *Eisenstein v. Whitman*, 4 Fed. Appx. 24 (2d Cir. 2001); and *United States el rel. Pentagen Technologies Int'l, Ltd. v. CACI Int'l, Inc.*, 172 F.3d 39 (2d Cir. 1999). Other than the decisions in these cases, I have not written or spoken publicly on the False Claims Act, on the constitutionality of any provision of the Act, or on the

constitutionality of any *qui tam* provision in any other federal statute. I do not have any bias against the False Claims Act that would impair my ability to decide fairly a case involving the statute.

12. I have long been an outspoken advocate of government whistleblowers. The Whistleblower Protection Act of 1989 remains the primary mechanism for whistleblowers to seek redress for reprisals and prohibited personnel practices taken against them for blowing the whistle on wrongdoing. However, the Executive Branch has not always viewed whistleblowers or whistleblower laws in a favorable light. Some have argued whistleblower protection statutes are unconstitutional because they restrict the activities and decisions of the Executive Branch.

- **Do you believe that the Legislative Branch has the constitutional authority to provide meaningful whistleblower protections for Executive Branch employees?**
- **Do you believe that Congress has the constitutional authority to restrict how the Executive Branch uses taxpayer dollars?**
- **Specifically, does Congress have the authority to limit appropriated funds from paying the salary of any Executive Branch employee that "prohibits or prevents, or attempts or threatens to prohibit or prevent, any other officer or employee of the Federal Government from having any direct…communication or contact with any Member…of Congress?" If not, why not?**

Response: Congress has constitutional authority to provide protection to Executive Branch whistleblowers, so long as any statute enacted by Congress is based upon a legislative power granted by Article I and does not violate any constitutional prohibitions. The Constitution grants Congress the power to appropriate taxpayer funds, and that power permits Congress to limit the Executive Branch's spending of taxpayer funds, again consistent with constitutional requirements. I would not comment on any particular congressional limitation on appropriated funds because the issue could come before the Supreme Court in the future.

13. In 2006, the Supreme Court issued a 5-4 decision in *Garcetti v. Ceballos*, which held that when public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes and the Constitution does not insulate their communications from employer discipline. This decision essentially creates a different set of First Amendment rights for public employees and private employees. I'm concerned that the decision has created an incentive for public employees to go outside their chain of command and report wrong doing to the media or some other outside channel because an employer could retaliate against them for speaking up inside the government agency.

- **Do you agree with the Court that public employees that speak up pursuant to their employment responsibilities they should not be entitled to First Amendment protections?**
- **Do you believe that there should be two standards for First Amendment speech for public employees and private employees?**

- **Do you agree with the Court that the limitation on First Amendment speech by Government employees acting pursuant to their employment responsibilities is necessary for providing "public services efficiently"?**
- **Under *Garcetti*, the Court created a system where there are now two types of First Amendment analysis for Government employees. First, if they speak pursuant to their employment responsibilities to report wrongdoing, they are afforded no First Amendment protection. However, if they speak as a citizen, presumably to the media or some other outside source to relay the concerns, the possibility of First Amendment protection arises, subject to the Court's precedent in *Pickering v. Board of Ed. Of Township High School Dist. 205* and *Connick v. Myers*. Do you agree that this two-step approach creates an incentive for a public employee to report wrongdoing outside of the chain of command? If not, why not?**

Response: I would not comment on the merits of a recent Supreme Court decision.

14. Last year, the federal government started making a large number of investments in private companies, such as banks, other financial institutions and automobile manufacturers. I believe that these investments raise significant legal and constitutional issues.

In 2008, the Federal Reserve, which has the authority to regulate and make emergency advances to banks, lent money to Bear Stearns and AIG, neither of which were banks. The Federal Reserve stated that it was relying on its power "to discount for any individual, partnership, or corporation, notes, drafts, and bills of exchange" in "unusual and exigent circumstances."

- **As a statutory matter, does the Federal Reserve have the authority to lend money to non-banks when that power, read as broadly as it has been in recent months, would nullify other, more specific provisions of the Federal Reserve Act that purport to limit the Fed's authority?**
- **The Supreme Court has stated that the Congress may delegate legislative power to the executive branch only if it provides an "intelligible principle" to guide the exercise of that power. Do you agree that, at a minimum, a statute that authorized the executive branch to take some discretionary action but fails to provide such an "intelligible principle" is an invalid delegation of legislative power?**
- **Does a statute that purports to empower an agency to lend money to any party in any circumstance and provides only that the agency shall promote economic growth and stable prices provide an "intelligible principle" to guide the exercise of that power?**
- **Do you believe that the executive branch, acting through the Federal Reserve, may lend any sum of money to any entity at all, so long as its governors claim that the loan promotes economic growth or stable prices, without any additional authorization from the Congress?**

- **Do you believe that the executive branch, acting through the Federal Reserve, may bail out any failing business without any additional authorization from the Congress?**
- **Is there any limitation at all on the executive branch's power to bail out failing businesses?**

Response: Congress's power to delegate authority to administrative agencies is limited by the requirement that an intelligible principle must govern any such delegation. This requirement also limits the power of administrative agencies to take action, including in situations in which (1) Congress delegates authority, and (2) an administrative agency takes or proposes to take action, in an effort "to bail out failing businesses." The more particular questions regarding how this requirement applies to past, existing or hypothetical programs would have to be answered in the appropriate factual context. I would not comment on the legality of past actions taken by Congress or by federal agencies, as those actions are, or might be, the subject of litigation in the federal courts.

15. What limitation, if any, does the Fifth Amendment's Takings Clause impose on the taxing power?

Response: Any such question could be answered only after receiving briefs and hearing argument on the issue in the factual context of a particular case, so I would not comment.

Responses of Judge Sonia Sotomayor
to the Written Questions of Senator Jon Kyl

1. Appended here are the relevant transcript pages (Appendix A) of our discussion of *Ricci v. DeStefano.* Later in the hearing, I said that I would provide you with an opportunity to review your answers and to provide any supplemental explanation that you felt appropriate. If you would like to supplement your answers to my questions regarding *Ricci*, please do.

Response: I would supplement my response to your question regarding the precedent governing the Second Circuit panel's decision in *Ricci v. DeStefano*, 530 F.3d 87 (2d Cir. 2008), with the following excerpt from Judge Barrington Parker's opinion—joined by me and by Judges Calabresi, Pooler, and Sack—concurring in the denial of rehearing en banc:

> The district court correctly observed that this case was unusual. Nonetheless, the district court also recognized that there was controlling authority in our decisions—among them, *Hayden v. County of Nassau*, 180 F.3d 32 (2d Cir. 1999) and *Bushey v. N.Y. State Civil Serv. Comm'n*, 733 F.2d 220 (2d Cir. 1984), *cert. denied*, 469 U.S. 1117, 105 S. Ct. 803, 83 L. Ed. 2d 795 (1985). These cases clearly establish for the circuit that a public employer, faced with a *prima facie* case of disparate-impact liability under Title VII, does not violate Title VII or the Equal Protection Clause by taking facially neutral, albeit race-conscious, actions to avoid such liability.

Ricci v. DeStefano, 530 F.3d 88, 90 (2d Cir. 2008) (Parker, J., concurring in the denial of rehearing en banc).

2. Also, in an exchange with Senator Hatch on July 15 (Appendix B) and in an exchange with me on July 16 (Appendix C), you discussed the differences in the roles of a district court judge and a circuit court judge. If you would like to add anything to these comments, please do.

Response: The line from my March 2006 speech quoted in Senator Hatch's question and in your question referred to the fact that circuit court opinions, unlike district court opinions, are binding precedent on all district courts within the circuit and on all panels of the circuit court.

3. To educate the public about the role of a judge, the ABA has described on its website the role of a judge in this way: "Judges are like umpires in baseball or referees in football or basketball. Their role is to see that the rules of court procedures are followed by both sides. Like the ump, they call 'em as they see 'em, according to the facts and law—without regard to which side is popular (no home field advantage), without regard to who is 'favored,' without regard for what the spectators want, and without regard to whether the judge agrees with the law." Do you agree that the ABA's statement provides a helpful way for the public to think about the role of a judge?

Response: I believe that all analogies are imperfect. I agree with the proposition, however, that judges, like umpires and referees, should be impartial, and in that sense the ABA analogy is

a helpful way for the public to think about the role of a judge.

Responses of Judge Sonia Sotomayor
to the Written Questions of Senator John Cornyn

1. You testified that judges do not make law; they only interpret the law. Can you identify any cases decided by any federal court in the history of the United States that "made" law? If so, please identify those cases.

Response: It is the role of Congress, not the federal courts, to make law. I believe that it is the role of the federal courts, including the Supreme Court, to "interpret" law, which is to say that those courts endeavor to determine the effect of the governing law, whether constitutional or statutory, in the context of the factual situation a case presents. In the history of the United States, there have been federal court cases—including Supreme Court cases—that have since been recognized as wrongly decided. I do not think of these cases as courts "making" law, however, as that role belongs to the legislature.

2. In your view, did *Brown v. Board of Education* make law or did it merely interpret law? Please explain.

Response: As explained in my response to question 1, I believe that the Supreme Court "interprets" law. *Brown v. Board of Education*, 347 U.S. 483 (1954), is widely regarded as a correct interpretation of the constitutional command for equal protection of the laws.

3. In your view, did *Roe v. Wade* make law or did it merely interpret law? Please explain.

Response: As explained in my response to question 1, I believe that the Supreme Court "interprets" law. Cases subsequent to *Roe v. Wade*, 410 U.S. 113 (1973), have re-affirmed the core holding of *Roe*. Cases related to termination of pregnancies continue to come before the Court, and therefore it would be inappropriate for me to comment further.

4. In your view, did *Lochner v. New York* make law or did it merely interpret law? Please explain.

Response: As explained in my response to question 1, I believe that the Supreme Court "interprets" law. The reasoning in *Lochner v. New York*, 198 U.S. 45 (1905), has been criticized by the Supreme Court, and that case is now widely regarded as wrongly decided.

5. In your view, did *Dred Scott v. Sanford* make law or did it merely interpret law? Please explain.

Response: As explained in my response to question 1, I believe that the Supreme Court "interprets" law, but *Dred Scott v. Sandford*, 60 U.S. 393 (1956), is widely regarded as wrongly decided.

6. In your view, did *Bush v. Gore* make law or did it merely interpret law? Please explain.

Response: As explained in my response to question 1, I believe that the Supreme Court "interprets" law. I would not comment on the merits of a recent Supreme Court decision.

7. In your article, *Returning Majesty to the Law and Politics: A Modern Approach*, you pointed out that an area of law can be uncertain when "a given judge (or judges) may develop a novel approach to a specific set of facts or legal framework that pushes the law in a new direction." In your view, when a judge develops a novel approach to a specific set of facts or legal framework that pushes the law in a new direction, is any new law "made"?

Response: As explained in my response to question 1, it is the role of Congress, not the federal courts, to make law. The role of the federal courts is to interpret the laws enacted by Congress by applying the law to the facts of particular cases. In some cases, federal courts perform this role by applying the law to new factual situations. When an appellate court decides such a case, the court's decision is binding precedent for the district courts in that circuit and for future panels of that circuit court. But this task of applying the law to new factual situations is not "making" law. That is a responsibility reserved to Congress.

8. Imagine that a state passes a new criminal statute prohibiting vehicles in a state park. The statute does not define the word "vehicle." Over the course of the next decade, courts in the state are confronted with a series of criminal prosecutions involving go-carts, bicycles, tricycles, motorcycles, Segways, helicopters, and wheelchairs, all of which were brought into state parks. The prosecutions lead to convictions, and the state supreme court rules on which of these means of transportation count as "vehicles" for purposes of the criminal statute prohibiting vehicles in a state park. In each of the cases, the state supreme court recognizes that there is no legislative history to determine what the legislature meant by the term "vehicle." However, the court announces that it will decide what is a "vehicle" based on what it terms "common sense." Applying this methodology, the state supreme court rules in individual cases that motorcycles and bicycles are vehicles but that go-carts, tricycles, Segways, helicopters, and wheelchairs are *not* vehicles. In this scenario, did the state supreme court make any law in your view? If so, why? If not, why not? If you need more information to answer the question, what information would you need to answer the question?

Response: As explained in my response to question 7, in some cases appellate courts apply the law to new factual situations, and those decisions become precedent that the appellate court and the lower courts within its jurisdiction are bound to follow. That does not mean, however, that the appellate courts have "made" law by deciding those cases. In the hypothetical you posit, the law was made when the state legislature passed the criminal statute at issue. The role of the courts is to apply that statute to new factual situations as they come before the courts in the context of particular prosecutions under the statute.

9. This question is a continuation of the question immediately above. Imagine that after the state supreme court has ruled on the meaning of the term "vehicle," the state

legislature decides to codify the court's holdings. The state legislature enacts a statute stating that the word "vehicle" as used in the statute includes motorcycles and bicycles but excludes go-carts, tricycles, Segways, helicopters, and wheelchairs. The legislature's goal is merely to codify the holdings of the state supreme court. In this scenario, did the state legislature make any law? If so, why? If not, why not? If you need more information to answer the question, what information would you need to answer the question?

Response: In the hypothetical you posit, the state legislature made law by enacting a statute defining the word "vehicle" for purposes of the criminal provision. That action constitutes making law because the passage of legislation is the process by which the policy preferences of the people, as expressed through their elected representatives, are codified in the law. Unlike a court applying the statute to a new set of facts in the context of a particular prosecution, the state legislature is not merely interpreting the law, it is making the law. The legislature's decision as to the proper scope of the term "vehicle" in the statute would therefore properly be based on policy considerations, while a court should not interpret the term "vehicle" according to its own policy preferences.

10. In response to your testimony last Tuesday, Georgetown University Law Center professor Louis Michael Seidman offered the following criticism at the Federalist Society's website, available at http://www.fed-soc.org/debates/dbtid.30/default.asp:

> **I was completely disgusted by Judge Sotomayor's testimony today. If she was not perjuring herself, she is intellectually unqualified to be on the Supreme Court. If she was perjuring herself, she is morally unqualified. How could someone who has been on the bench for seventeen years possibly believe that judging in hard cases involves no more than applying the law to the facts? First year law students understand within a month that many areas of the law are open textured and indeterminate—that the legal material frequently (actually, I would say always) must be supplemented by contestable presuppositions, empirical assumptions, and moral judgments. To claim otherwise—to claim that fidelity to uncontested legal principles dictates results—is to claim that whenever Justices disagree among themselves, someone is either a fool or acting in bad faith. What does it say about our legal system that in order to get confirmed Judge Sotomayor must tell the lies that she told today?**

Please take this opportunity to respond to Professor Seidman.

Response: In my view, it is the task of a court to apply the law to the facts of the cases that come before it. This does not mean that every case will be easy, or that any disagreement between judges as to the proper outcome in a particular case is the result of an intellectual mistake or bad faith. In some cases, the task of applying the law to the facts is very difficult—because the factual situation is a novel one, or because different constitutional or statutory

provisions point in different directions, or because the case highlights a tension between different lines of precedent, for example. In those cases, the court looks to traditional sources of legal authority, such as the text of the statute or the Constitution and applicable precedent, to make a determination as to the proper application of the law to the facts before it. I do not believe that a court's decisions should be based on a judge's own presuppositions, assumptions, or moral judgments.

11. In the third round of questioning, on Thursday, I asked you about your statement that you would not "use" foreign or international law. You stated that "use appears . . . to people to mean if you cite a foreign decision, that's means it's controlling an outcome or that you are using it to control an outcome." Please identify the sources you are aware of, if any, that have referred to the "use" of foreign law to mean that it is controlling an outcome or being used to control an outcome.

Response: My answer was based on my own understanding of what it means for a court to "use" foreign law to decide a case. In my view, American courts should not rely on decisions of foreign courts as binding or controlling precedent, except when American law requires them to do so, as in some cases involving treaties or conflicts of law. In some limited circumstances, decisions of foreign courts can be a source of ideas, just as law review articles or treatises can be sources of ideas. Reading the decisions of foreign courts for ideas, however, does not constitute "using" those decisions to decide cases.

12. You testified that you would not "use" foreign law to interpret the U.S. Constitution or U.S. statutes. Please answer the following questions that are designed to understand what you mean by the word "use":

a. When the U.S. Supreme Court cites and discusses U.S. Supreme Court precedent, is it "using" that precedent?
b. When the U.S. Supreme Court cites and discusses the decisions of federal circuit courts as persuasive authority, is it "using" those decisions?
c. When a federal court of appeals cites and discusses the decisions of other circuit courts, is it "using" those decisions?
d. **When a federal court cites a law review article as persuasive authority, is it "using" the article?**

Response: When the Supreme Court relies on its prior precedents as legal authority governing a decision, the Supreme Court is "using" those precedents to decide the case before it. Similarly, when the Supreme Court cites and discusses the decisions of lower federal courts as persuasive legal authority, it is using those decisions to decide the case. The same is true of a federal court of appeals citing the decisions of other federal courts of appeals. However, when a federal court references a law review article as the source of an idea that the court applies in its decision, the court is not "using" the article as authority to decide the case, because law review articles have no legal authority in our legal system.

Responses of Judge Sonia Sotomayor
to the Written Questions of Senator Tom Coburn

1. Why do you think the Supreme Court came to a different conclusion in *Gonzales v. Carhart* than it did in *Stenberg v. Carhart*?

a. What were the state interests at issue in *Gonzales v. Carhart*?

Response: In *Gonzales v. Carhart*, 550 U.S. 124 (2007), the Supreme Court distinguished its prior decision in *Stenberg v. Carhart*, 530 U.S. 914 (2000), on the grounds that the Act at issue in *Gonzales* contained extensive legislative findings, was more specific in its coverage, and included an overt act requirement. *Gonzales*, 550 U.S. at 141, 153.

In setting forth the state interests in *Gonzales*, the Supreme Court stated that the "State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child." 550 U.S. 124, 145 (2007) (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U. S. 833, 846 (1992)). In reviewing the constitutionality of the federal ban, the Court focused on "determin[ing] whether the Act furthers the legitimate interest of the Government in protecting the life of the fetus that may become a child." *Id*. The Court also stated that "the government 'has an interest in protecting the integrity and ethics of the medical profession'" and that government has a "legitimate concern" in providing women with information on the manner in which the abortion will be carried out. *Id*. at 157.

2. During your hearing in response to a question from Senator Graham, you described your role on the board of the Puerto Rican Legal Defense Fund as follows: "To the extent that we looked at the organization's legal work, it was to ensure that it was consistent with the broad mission statement of the fund." You further stated that "the issue was whether the law was settled on what issues the fund was advocating on behalf of the community it represented. … so, the question would become, was there a good faith basis for whatever arguments they were making …"

a. Do you think a lawyer could make a "good faith" argument that the Constitution requires the federal funding of abortion for those women who cannot afford it?
   i. Is the issue settled law?
b. Do you think a lawyer could make a "good faith" argument that a parental notification law was unconstitutional?

Response: Rule 3.1 of the ABA Model Rules of Professional Conduct states that a "lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law." Rule 11 of the Federal Rules of Civil Procedure requires that an attorney make legal arguments that are warranted by existing law or by a "nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law." Earlier versions of Rule 11, which were in effect at the time I sat on the

PRLDEF board, likewise prohibited attorneys from making frivolous arguments, or arguments which lacked "good ground" or a "good faith" basis.

In a series of cases, the Supreme Court has held that government "need not commit any resources to facilitating abortions" and, if resources are expended, may "make a value judgment favoring childbirth over abortion and . . . implement that judgment by the allocation of public funds." *Webster v. Reproductive Health Services*, 492 U.S. 490, 510-511 (1989); *see also Rust v. Sullivan*, 500 U.S. 173 (1991) (upholding Title X regulations prohibiting recipients from engaging in abortion counseling, abortion referral, and activities advocating abortion); *Harris v. McRae*, 448 U.S. 297 (1980) (upholding the most restrictive version of the Hyde Amendment, which withheld from states federal funds under Medicaid to reimburse the costs of abortions, with an exception only for the life of the woman); *Maher v. Roe*, 432 U.S. 464 (1977) (rejecting due process and equal protection challenges to Connecticut welfare regulation under which Medicaid recipients received payments for medical services related to childbirth, but not for nontherapeutic abortions).

The Supreme Court has also held that "[s]tates unquestionably have the right to require parental involvement when a minor considers terminating her pregnancy." *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 324 (2006). "A State may not restrict access to abortions that are necessary, in appropriate medical judgment, for the preservation of the life or health of the mother," however. *Id.* at 327–28 (internal quotations omitted).

In light of these precedents, whether a lawyer could make a good faith argument that the Constitution requires federal funding of abortion or that a particular parental notification statute is unconstitutional today is a question that would need to be examined in the factual context of a particular case. Because the constitutionality of particular parental notification statutes and particular funding statutes are issues that may come before the Court in the future, I should not comment on whether there might be any good faith argument that would support the proposition that any parental notification or federal funding statute is unconstitutional.

3. You testified that you did not review any of the briefs the Puerto Rican Legal Defense Fund submitted concerning abortion rights. What role precisely did you play with regard to this litigation?

- **a. How did you, as a board member, determine that the legal work in these cases was consistent with PRLDEF's mission statement?**
- **b. In PRLDEF's briefs, the group advocates in favor of public funds for abortion, opposes parental notification laws and practically any other restrictions on abortion such as 24-hour waiting periods and other economic barriers, and opposes the "undue burden" standard. Did you ever express concern or opposition to these positions? If so, how did you express this opposition?**
  - **i. If not, why?**

Response: As a member of the board of the Puerto Rican Legal Defense and Education Fund, I did not write, edit, or approve briefs drafted by the organization's staff lawyers. While

the board was responsible for ensuring that the broad areas of litigation were consistent with the mission statement of the Fund, the board reviewed neither the briefs in cases selected by the staff lawyers, nor the individual arguments made by those lawyers in briefs filed on behalf of the Fund.

4. Is a state entitled to declare that for all purposes (except abortion law) the life of the human being begins at conception?

a. Why shouldn't the American people be able to debate and come to some political resolution on the matter of abortion?
b. By reserving this matter to itself, didn't the Supreme Court create the very conditions that today poison our politics?
c. Doesn't the "undue burden" test articulated in *Casey* call for a pure policy choice? In a recent *New York Times* article, Justice Ginsburg sure seems to recognize that fact. She stated: "I'm not a big fan of these tests. I think the court uses them as a label that accommodates the result it wants to reach." Do you agree with her statement?

Response: The Supreme Court has held that the liberty provision of the Due Process Clause of the Fourteenth Amendment protects a woman's right to terminate a pregnancy in certain circumstances, and I accept those decisions as the Court's precedents. I cannot speak for Justice Ginsburg, thus I cannot explain what she meant by her statement.

5. Does the Constitution protect the right to engage in scientific research? If so, what are the contours of such a right?

Response: The Supreme Court has not recognized such a right. Because this issue may come before the Supreme Court in the future, I should not comment further on whether such a right exists or the contours of such a right.

6. What constitutes clear and convincing evidence that a cognitively incapacitated patient (with no living will or advance directive) wishes to discontinue life sustaining measures?

Response: In *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990), the Court upheld Missouri's requirement that there be clear and convincing evidence establishing a patient's intent to have life-sustaining nourishment withdrawn. The issue of what constitutes "clear and convincing evidence" would require an examination of the factual record developed in a particular case to determine what evidence is sufficient in reference to the particular statute. This is an issue that could come before the Supreme Court, and therefore I should not comment generally on what constitutes clear and convincing evidence.

7. Since the announcement of the Court's decision in *Vacco v. Quill* and *Washington v. Glucksberg*, has anything changed that would warrant the conclusion that there is a Constitutional right to assisted suicide?

Response: *Vacco v. Quill*, 521 U.S. 793 (1997), and *Washington v. Glucksberg*, 521 U.S. 702 (1997), are decisions of the Supreme Court, and I accept them. Whether there are any changed factual circumstances that would warrant revisiting those cases is a question that may come before the Court in the future, and so I would not comment on it.

8. Under what circumstances do you think racial preferences are unconstitutional?

a. When do you think they are in violation of the 1964 Civil Rights Act?
b. What do you think are compelling reasons to engage in racial preferences or bias?

Response: Governmental use of racial classifications violates the Equal Protection Clause of the Fourteenth Amendment unless the classifications are narrowly tailored to serve a compelling state interest. The Supreme Court has identified several governmental interests that are sufficiently compelling to permit racial classifications, including remedying the effects of past discrimination, *see, e.g., Wygant v. Jackson Board of Education*, 476 U.S. 267, 274 (1986), and securing the benefits that flow from a diverse student body in the context of higher education, *see, e.g., Grutter v. Bollinger*, 539 U.S. 306, 330 (2003); *Gratz v. Bollinger*, 539 U.S. 244, 268 (2003). In addition, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, prohibits employment discrimination on the basis of race, including both intentional discrimination and, in certain situations, practices that have a disproportionately adverse effect on minorities even though they may not be intended to discriminate in fact. *See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971).

9. In *Crawford v. Washington*, the Supreme Court overturned long-standing precedent on confrontation of witnesses and the admission of out-of-court statements. Admissibility now depends primarily on whether a statement is deemed "testimonial," not on whether it is reliable. This change has made prosecution of domestic violence cases more difficult. In your view, is the "testimonial" nature of a statement the proper criterion for deciding whether it can be admitted consistently with the Confrontation Clause?

Response: The standard for determining whether an out-of-court statement by an unavailable witness is admissible under the Confrontation Clause of the Sixth Amendment is set forth in *Crawford v. Washington*, 541 U.S. 36, 59 (2004): "Testimonial statements of witnesses absent from trial" are admissible "only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." As to the merits of the *Crawford* case, my view is simply that the decision made by the Court is now governing precedent.

10. The Supreme Court has narrowed standing doctrine in recent years. Do you think this is a good development?

a. Should citizens generally be able to challenge executive or congressional action in federal court even if they have not been directly harmed by such action?

Response: The Supreme Court has applied the standing doctrine in several recent cases. In at least one of those cases, the Court held that the plaintiffs had standing to challenge the government action at issue, *see, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497 (2007), while in others the Court held that the plaintiffs did not have standing *see, e.g.*, *Summers v. Earth Island Institute*, 129 S. Ct. 1142 (2009); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006). I accept these decisions as the Court's precedents and would not otherwise comment on their merits. As to whether citizens should be able to challenge governmental action in federal court even if they have not been directly harmed by that action, the Court has answered that question by applying the traditional standing requirements to the facts of particular cases.

11. Do states have the power to determine the appropriate use of medication within their borders? If so, under what authority?

a. In light of *Gonzales v Oregon*, would the Congress or another federal agency be exceeding the scope of their powers if either were to pass a law prohibiting the use of certain drugs with respect to physician-assisted suicide?

Response: The Supreme Court has stated that "regulation of health and safety is 'primarily, and historically, a matter of local concern,'" *Gonzales v. Oregon*, 546 U.S. 243, 271 (2006) (quoting *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 719 (1985)), and that our federal system grants States "'great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.'" *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) (quoting *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985)).

In *Gonzales*, the Court concluded that the Controlled Substances Act, 21 U.S.C. § 801 *et seq.*, did not allow the Attorney General to prohibit doctors from prescribing regulated drugs for use in physician-assisted suicide. Although the Court noted that "the Federal Government can set uniform national standards in th[e] areas" of health and safety, 546 U.S. at 271, it did not address whether a federal law clearly prohibiting the use of certain drugs with respect to physician-assisted suicide would fall within the scope of Congress's legislative authority under the Interstate Commerce Clause or other sources of congressional power, nor whether it would implicate any protections in the Bill of Rights.

12. Was the Court's conclusion in *Ledbetter v. Goodyear Tire & Rubber, Co.*, holding that the relevant statute of limitations imposing a particular time period for initiating an employee claim against an employer had been exceeded by the plaintiff, correct? If not, how did the Court err?

Response: The Court held in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), that the time limit for filing an equal-pay discrimination charge begins at the time of the initial discriminatory pay decision, not when later pay decisions that allegedly perpetuate the effect of the earlier decision occur. Congress responded to this case by enacting the Lilly Ledbetter Fair Pay Act of 2009, which amended the Civil Rights Act of 1964 to make the statute of limitations for an equal-pay discrimination lawsuit began anew with each discriminatory

paycheck a plaintiff receives. Whatever the merits of the Court's decision, Congress's new statute has supplanted the *Ledbetter* holding.

13. Do you have misgivings about the provision of educational materials and equipment to private schools under *Mitchel v. Helms*?

Response: *Mitchell v. Helms*, 530 U.S. 793 (2000), is a decision of the Supreme Court and I accept it as precedent.

14. Is *Zelman v. Simmons-Harris* settled law? If not, why not?

Response: *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), is a decision of the Supreme Court and I accept it as precedent.

15. Please describe your understanding of the political questions doctrine.

Response: The political question doctrine is a doctrine of justiciability. The Supreme Court has identified a number of factors bearing on whether particular constitutional issues present nonjusticiable political questions. Those factors include whether there is: (1) "a textually demonstrable constitutional commitment of the issue to a coordinate branch of government"; (2) "a lack of judicially discoverable and manageable standards for resolving it"; (3) "an impossibility of deciding [the issue] without an initial policy determination of a kind clearly for nonjudicial discretion"; (4) "the impossibility of a court's undertaking independent resolution [of the issue] without expressing lack of the respect due coordinate branches of government"; (5) "an unusual need for unquestioning adherence to a policy decision already made"; and (6) "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Baker v. Carr*, 369 U.S. 186, 217 (1962).

16. In 1976, in the case of *Fitzpatrick v. Bitzer*, the Court held that Congress could, consistent with the Eleventh Amendment, override state sovereign immunity through its enforcement power under section 5 of the Fourteenth Amendment. Is *Fitzpatrick* consistent with *Seminole Tribe of Florida v. Florida*? Please compare the decisions?

Response: In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), the Court held that Congress lacks the power under the Indian Commerce Clause to abrogate states' sovereign immunity under the Eleventh Amendment. It made clear that the same was true for Congress's power under the Interstate Commerce Clause. But *Seminole Tribe* left intact the Court's earlier holding in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), that Congress does have the authority under Section 5 of the Fourteenth Amendment to abrogate states' sovereign immunity. As the Court explained in *Seminole Tribe*, "*Fitzpatrick* was based upon a rationale wholly inapplicable to the Interstate Commerce Clause, *viz.*, that the Fourteenth Amendment, adopted well after the adoption of the Eleventh Amendment and the ratification of the Constitution, operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment." 517 U.S. at 65-66.

17. How do you reconcile the tension between an enumerated power, the 10th Amendment, and the Commerce Clause?

Response: The Interstate Commerce Clause is one of the constitutionally enumerated sources of congressional power. Within the scope of that and other sources of federal legislative power, Congress has broad authority. But the constitutional enumeration of federal legislative power is also a limitation: Congress has no authority to legislate except pursuant to a constitutionally enumerated source of power. *See Marbury v. Madison*, 1 Cranch 137, 176 (1803) (Marshall, C.J.) ("The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written."). This is a critical feature of our constitutional federalism. The Tenth Amendment underscores this point by providing that "[t]he powers not delegated to the [United States] by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."